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Court, U.S.

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IN THE

Supreme Court of the United States

SANDRA KAY BATTISTA, *et al.*,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether when Congress said that parties to employee benefit contracts that the FDIC has lawfully repudiated — but no other parties not similarly situated — were entitled to be paid "damages" by the FDIC it intended that the FDIC could pay those damages from liquidated bank assets rather than from its own resources in cash, despite California law requiring that such employee benefits be paid in cash.

PARTIES TO THE PROCEEDING

The Petitioners not listed in the caption are: Joan Renee Taylor; Douglas Fabbri; Laurie Lou Chandler; Sherry Leysen; Karen A. Marino; Patsy D. Thompson; Bobbie J. McNeil; Mary Marsicano; Shirley A. Van Buskirk; Erika Rivero; Robert B. Faternick; Donald J. Bruyn; Annette Hanson; Julie C. Mazo; Constandeanna Elenie Wright; Glenda C. Moberg; Pamela A. Fairchild; Rebecca L. Smith; Cathy Lynn Fulton-Maloney; Harold Richard Norbrothen; Deborah Jane Tafoya; Carmen Razo; Robert Edward Steele; David S. Gordon; Linda Susan Aubin; Gilbert Fonseca; Mary Kellogg; Lisa M. Kelsey; Laura Lilly; Carole Meyers; James W. Pilgrim; Sarah E. Rodriguez; Nancy L. Shipman; Shawn Alison Shoemaker; Donna Smith; Jackie Todd; Courtney Wight; Cheryl C. Zweber; Carol Ann Okon; Lois A. Marcus; James L. Lauritzen; Valerie A. Hussey; Roberta L. Facchina; Ina Hahn; Diane Jo Allen; Tracy A. Allen; Carol Dignard; Hasmik Keyribaryan; Cathy Kiaha; George Klasser; Evodio Medina; Violette Naaman; Kimberly Jo Oliva; Hasmik Pashaie; Susan J. Rossi; Maria Del Carmen Contreras; John U. Crandall, III; Jan M. Eisenbeisz; Kyle Lance Miller.

The Respondent is the Federal Deposit Insurance Corporation, a federal agency.

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Petitioners respectfully ask this Court to issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A, 1a) is reported at *Battista v. FDIC*, 195 F.3d 1113 (9th Cir. 1999). The district court opinion (App. C, 22a), is unreported. The district court's order denying reconsideration is also unreported (App. B, 19a).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 2, 1999. A timely petition for rehearing was denied on January 27, 2000 (App. E, 40a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant text of 12 U.S.C. § 1821, subsections (d) and (i), is set forth at App. F. The key provision of § 1821(e) states:

> **(e) Provisions relating to contracts entered into before appointment of conservator or receiver.**
>
> * * *

(3) Claims for damages for repudiation.

(A) In general. Except as otherwise provided, the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of —

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of the any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages. For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

STATEMENT OF THE CASE

The fundamental question in this case is whether when Congress made the FDIC liable to pay "actual direct compensatory damages" when it lawfully repudiated certain kinds of long-term contracts that certain parties had with a failed financial institution[1] it intended those damages to be paid by the FDIC in cash, as California law requires for employee benefits, or whether all that Congress meant by a right to "damages" was the right to have a "receiver's certificate" that the FDIC could require be satisfied out of the liquidated assets of the bank.

No court has ever decided what Congress meant when it said that the FDIC must pay "damages" and no federal court has ever specifically defined "damages" in any context applicable here. But courts, commentators and dictionaries all equate a right to "compensatory damages" to a right to cash money; the California Supreme Court has specifically so held. And until the decision below, no court has ever allowed a government agency to satisfy its own liability to pay compensatory damages with property belonging to others.

Although the specific question is itself is of first impression, the decision below conflicts with every relevant conclusion of the Courts of Appeals, including the Ninth Circuit's own previously expressed views, the assumptions of this Court about what damages are and do and this Court's holding on the preemptive effect of FIRREA. If allowed to

1. For clarity, while FIRREA speaks of all bank regulators and all failed financial institutions, petitioners will generally refer to the Federal Deposit Insurance Corporation ("FDIC") and "the bank" throughout this petition.

stand, the decision nullifies the remedial intent that Congress wrote into the statute by depriving petitioners of cash compensation for valuable employee benefits that Congress and California intended they should have.

A. FIRREA's Treatment of Claims

In 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), in response to the nation's banking crisis. The law makes the FDIC the receiver or conservator of a failed institution for the protection of depositors and creditors and establishes a scheme for dealing with claims against the failed institution on its existing obligations. These obligations range from the ordinary consumer debts of any business to long-term contracts that survived the bank's failure.

To resolve and dispose of all of these obligations, Congress classified them into two discrete categories: certain valuable long-term contracts that the regulator is required to assume or reject under 12 U.S.C. § 1821(e) and the balance of the ordinary contracts and trade debts of the bank that are to be proven and then paid out of the collected liquidated assets of the failed bank under 12 U.S.C. § 1821(d).

Ordinary obligations owed to trade creditors are treated much as a bankruptcy court treats the debts of a debtor. The parties are required to submit proofs of their claims to the FDIC and all approved claims were entitled to participate, pro rata, in the marshaled and liquidated limited assets of the failed bank. To that end, Congress provided a comprehensive scheme, including short statutes of limitation, for the processing and satisfaction of those claims to the extent of the bank's assets.

With respect to the narrow class of contracts that the FDIC was required to assume or reject, however, after the FDIC exercised its discretion to assume and therefore perform those contracts, or to repudiate them, Congress tersely provided that those parties, including petitioners, whose contracts are repudiated are entitled to "damages", but Congress provided neither a mechanism to establish these "damages" nor a timetable beyond "a reasonable period" for the FDIC to act.

Because Congress did not provide any express mechanism for the processing by the FDIC of the claims of parties entitled to contract repudiation damages, the Courts of Appeals allowed the FDIC to use for "damages" claims the same forms it uses to process ordinary creditors' claims, based on some of the mechanisms that Congress had established for the processing of those claims. *See, e.g., Heno v. FDIC*, 20 F.3d 1204, 1207-1210 (1st Cir. 1994). But prior to the decision here no court had ever concluded that the FDIC's desire to process a claim form submitted by a party who was entitled to "damages" after repudiation converted that claimant's statutory right to "damages" from the FDIC into a mere trade creditors' claim payable from the liquidated assets of the failed bank.

B. Procedural Background

Petitioners were employees of the Bank of Newport, which was seized by the FDIC after it failed. Each petitioner had a severance and separation agreement with the bank that provided for a fixed sum upon termination calculated on the basis of that petitioner's wages and years of employment. When the bank was seized petitioners' right to payment vested. App. 30a-31a.

Each petitioner then timely filed a claim form provided by the FDIC and, as it was lawfully entitled to do, in due course the FDIC repudiated each of the severance and separation agreements. After the FDIC refused to pay, petitioners sued for the damages to which Congress said they were entitled upon repudiation of their contracts. App. 31a.

The parties stipulated that each petitioner was entitled to actual direct compensatory damages from the FDIC pursuant to § 1821(e) and *Monrad v. FDIC*, 62 F.3d 1161, 1172 (9th Cir. 1995), and consequently that each was individually entitled to judgment for damages from the FDIC in individual amounts that aggregate to $731,354.80. The district court entered an order to that effect. App. D, 31a, 35a.

The FDIC then moved for an order that the judgment for damages against it could be satisfied by it by the tender of receiver's certificates payable out of the proceeds of the liquidation of the Bank of Newport's assets rather than in cash. The district court granted the motion. In its opinion, the district court concluded that petitioners' right to damages under § 1821(e) was no more than a low priority claim against the assets of the failed bank that were distributed pursuant to § 1821(d)(11), and that therefore the FDIC was not required to pay petitioners' damages claims in cash. App., 22a-26a.

Petitioners filed a timely appeal to the Ninth Circuit Court of Appeals. On November 2, 1999, that court affirmed the district court's judgment, concluding that the damages for which that Congress had made the FDIC liable to repudiated contract claimants such as petitioners under § 1821(e) were merely a subset of all claims of all claimants against the failed bank and were therefore to be paid solely

from the bank assets marshaled and distributed according to the priorities set out in § 1821(d), because Congress had limited the FDIC's liability as receiver to the assets of the insolvent institution pursuant to § 1821(i)(2). App. 10a-13a. The panel also held that because repudiation damages under §1821(e) are subject to the distribution priority of § 1821(d)(11)(A), California law requiring that all wages be paid in cash was preempted. App. 15a-16a.

Petitioners' request for reconsideration and suggestion for en banc review was denied and rejected on January 27, 2000. App. E.

REASONS FOR GRANTING THE WRIT

I.

WHEN CONGRESS GAVE REPUDIATED DAMAGES CLAIMANTS "DAMAGES" IT MEANT THAT THEY SHOULD BE COMPENSATED WITH CASH AND NOTHING LESS

In § 1821(d) Congress said that repudiated contract claimants were entitled to "actual direct compensatory damages" from the FDIC. Congress meant what it said. The Ninth Circuit thinks otherwise, holding that petitioners, as repudiated contract claimants, were not entitled to "actual direct compensatory damages" in the form of cash money paid by the FDIC, but instead had to accept effectively worthless receiver's certificates that could only be satisfied from the minimal assets of the liquidated Bank of Newport, petitioners' former employer.

In its decision, the Ninth Circuit reasoned that since Congress had established an elaborate claims process and a distribution priority in § 1821(d) for the bank's creditors, and since § 1821(i) limits the liability of the FDIC to the creditors' distributive share of the assets of the failed bank, petitioners' right to § 1821(e) damages was simply a subset of the claims described in § 1821(d) and their claims against the FDIC for damages were effectively the same as those of ordinary trade creditors and could be satisfied out of bank assets instead of with cash money.

The crux of the Ninth Circuit's opinion was its belief that Congress must have intended "damages" under § 1821(e) to be payable as if they were trade creditors' claims under § 1821(d) because Congress would not otherwise have failed to create a parallel process for claiming and proving "damages" equivalent to the elaborate scheme created in § 1821(d). That conclusion overlooks one hugely important fact.

A creditor's claim is a creature of statute and its processing and administration, like the processing and administration of claims against the assets of a debtor in bankruptcy, is a matter of statutory articulation. Damages, on the other hand, have been proved and calculated under the common law for centuries. Congress did not have to invent those rules and did not have to tell the FDIC or the courts what to do or how to do it because Congress, like everyone else, knew exactly what damages were and how to get them.

No court has ever found that FIRREA is a model of clarity. But the Ninth Circuit's decision here ignores the fact that Congress only allowed "actual direct compensatory damages" to claimants under subsection (e), "damages" are

"cash money", not anything less and they are intended to compensate for the full value of a claimant's loss. A receiver's certificate, on the other hand, is not the equivalent of cash and does not give full value, and the process by which ordinary trade creditors are given receiver's certificates was neither necessary for nor intended to apply to repudiated contract claimants to whom Congress had given the right to "damages".

Beyond the obvious fact that Congress placed damages for repudiated contract claimants in a separate and facially coequal subsection of § 1821, it used different terms to describe the claimants, gave each type of claimant different rights, set up different statutes of limitations for each class of claimant and provided different remedies for each. The Ninth Circuit's decision obliterates all of Congress' distinctions.

A. Congress Only Gave "Damages" to Repudiated Contract Claimants and Did Not Give "Damages" to "Creditors".

When Congress uses a word or a phrase courts must apply that language as Congress intended that it should be understood:

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted) (internal quotation marks omitted). Moreover, it is a

> fundamental canon of statutory construction that the words of s statute must be read in their context and with a view to their place in the overall statutory scheme.

Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989). Congress gave repudiated contract claimants, and only those claimants, the right to "actual direct compensatory damages" in subsection (e). Congress described claimants under subsection (d), but not repudiated contract claimants under subsection (d), as "creditors", in no other part of § 1821 gave "damages" to "creditors" and only limited the FDIC's liability to "creditors", not to "damages" claimants in § 1821(i).

Since Congress chose to give repudiated contract claimants and no one else "actual direct compensatory damages" in a separate subsection that choice must be given effect by giving the word and the phrase their intended meaning.

B. "Damages" Are Universally Understood to Be Money.

Curiously, considering the importance of damages in American jurisprudence, neither this Court nor the courts of appeals appear actually to have expressly held that compensatory damages are payable in money and not with something less, although many courts, including this Court, have come reasonably close. But from historic times, damages are and have been universally understood to be compensation in the form of cash money.

The preeminent legal dictionary fills over four pages with definitions of kinds of damages, all variants of its initial definition of the word as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Black's Law Dictionary, 393-397 (7th ed. 1999). Popular lay dictionaries are the same; the ordinary definition of "damages" is "money ordered to be paid as compensation for injury or loss." AMERICAN HERITAGE COLLEGE DICTIONARY 3D, p. 350 (1993). And obviously, Congress knew that there existed an entire common law of many centuries' standing that provides for the payment of "damages" in money. *See, e.g.*, Belli, MODERN DAMAGES (1959) § 7, p. 21 and the lengthy disquisition that follows; RESTATEMENT OF CONTRACTS (SECOND), §§ 344-347, pp. 102-119 and authorities cited therein. Indeed, this definition is so universally accepted that when anyone, including this Court and certainly not excluding Congress, has spoken of damages it is cash money to which the reference has been made without any need for discussion.

For example, when this Court was called upon to interpret the extension of jurisdiction to the district courts to hear actions "seeking relief other than money damages", in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), not only did the majority hold that "damages" are a form, although not the only form, of payment of money, it used the terms "money damages", "damages" and "monetary relief" as synonymous and interchangeable and quoted with approval an opinion of the court of appeals that confidently asserted that damages are "a sum of money" given to a plaintiff as "compensatory relief" and as a substitute for a suffered loss, while the dissent expressly and succinctly found that the term "damages" encompassed the entire category known in the common law as monetary compensation for a loss. 487 U.S. at 892, 895; 487 U.S. at 913-915 (Scalia, J., dissenting).

In *Bowen*, the language of the statute coupled the word "money" to the word "damages" and the case is therefore distinguishable, nor was it necessary for this Court to consider in *Bowen* whether a person with a statutory right to damages had to be compensated with money, but it is obvious that this Court too believed that "damages" are "money".

Since Congress did not expressly define the term in the statute it must be interpreted as taking its "ordinary, contemporary common meaning". *See Perrin v. United States*, 444 U.S. 37, 42-43 (1979). The ordinary and common meaning of "damages" has invariably been money. Thus, when Congress used the word "damages" it must have understood and intended that "damages" should be paid in money.

C. Congress Intended That Repudiated Contract Claimants' "Damages" Compensate Them For The Full Value Of Their Loss.

The fact that "damages" must be paid in money is, however, not the end of the analysis. Congress did not grant mere "damages" to repudiated contract claimants like petitioners, it described those damages as "*actual direct compensatory* damages". Manifestly, Congress did not casually place three separate adjectives modifying "damages" into § 1821(d). By describing the damages that repudiated contract claimants had a right to get as "actual", "direct" and "compensatory" Congress emphasized that it expected that such claimants should be made whole.

"Actual" means "existing and not merely potential or possible." AMERICAN HERITAGE COLLEGE DICTIONARY 3D, *supra*, at 14. "Direct", as relevant here, means "having no

intervening persons, conditions, or agencies; immediate." AMERICAN HERITAGE COLLEGE DICTIONARY 3D, *supra*, at 392. And as just about every court that has considered the issue has understood and held, Congress meant full value when it said that damages awarded under § 1821(e) should "compensate".

Damages for the repudiation of the contractual right to severance payments under § 1821(e) (to which the Ninth Circuit has correctly held parties like petitioners here are entitled, *Monrad*, 62 F.3d at 1174) are "damages which can be thought to make one whole . . ." *Office and Professional Employees International Union, Local 2 v. FDIC*, 27 F.3d 598, 604 (D.C. Cir. 1994) ["*OPEIU*"]. A party is entitled to the "actual amount due" on the contract in order "precisely" to "compensate" for the loss; "[t]he damages are clearly compensatory; the loss caused by the injury is simply replaced.". *McMillan v. FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996). The purpose of § 1821(e) damages is "to put [the party entitled to them] where he would have been if the contract had been fulfilled." *Nashville Lodging Co. v. RTC*, 59 F.3d 236, 246 (D.C.Cir. 1995) (comparing to reliance damages).

And, of course, when the Ninth Circuit adopted the § 1821(e) of D. C. Circuit's interpretation in *OPEIU* it also expressly adopted that Circuit's conclusion that repudiated contract damages claimants were entitled to "damages which can be thought to make one whole". *Monrad*, 62 F.3d at 1174, quoting *OPEIU*, 27 F.3d at 604.

There can therefore be no question that Congress meant that payment of damages to repudiated contract creditors like petitioners should make them whole.

D. A Receiver's Certificate Is Not Money and Does Not Give Full Value or Make the Recipient Whole.

Since Congress intended that repudiated damages claimants be promptly compensated fully and made whole for the loss of their valuable contract rights, plainly only cash will replace or reimburse petitioners for the severance and separation pay that they did not collect or put them in as good a position as they would have been in had they received full performance of their contracts. On the other hand, if Congress had intended that repudiated contract claimants should be given certificates that merely allowed them to join the scramble for the scraps of the failed bank it would have said so and not used a word and a phrase so completely at odds with that concept. The Ninth Circuit's decision that the FDIC could satisfy petitioners' right to "damages" by the tender of receiver's certificates is simply wrong.

A receiver's certificate is simply an administrative document that gives its holder no more than the potential right to future proceeds from the meager assets of a bank that had to be seized and liquidated because it did not have enough assets or value to survive. In stark contrast to the value inherent in the award of "actual direct compensatory damages", a receiver's certificate is clearly not "money" but instead merely a piece of paper that might someday entitle the holder to a possible distribution; here the FDIC concedes that there will be nothing.

In short, if a receiver's certificate gives full value that is a fortunate and rare happenstance and hardly "actual" or "direct", and Congress could hardly have intended that a right to be compensated in full could be satisfied by the tender of a mere expectation and a generally hopeless one at that.

E. Congress Could Not Have Intended the Process by Which "Creditor Claims" Are Proven and Paid Be Applied to the Payment of "Damages".

The Ninth Circuit's decision is also inconsistent with Congress' statutory regime for the payment of claims under § 1821(d). Not only is a receiver's certificate, unlike money damages, only the culmination of a detailed administrative process established in § 1821(d) as the sole remedy for parties Congress described as "creditors" of the failed bank, that process is simply inapplicable and inappropriate to its use for "damages" claims.

First, while repudiated contract claimants are given "damages", everyone else is given "claims", and the determination of "claims" is only provided in subsection (d). App. 42a. If Congress had intended to let the FDIC determine damages as if they were claims it would have said so.

Second, as noted, parties who get "damages" are not described in any part of § 1821 as "creditors", but everyone else is and everyone else's claims are described as "creditor claims". If Congress had intended that repudiated contract claimants be included with everyone else it would have used the same terms for both.

Third, the explicit and detailed notice provisions in subsection (d) require notice promptly published and republished, mailed and remailed, to the bank's creditors. § 1821(d)(3)(A), (B) and (C), App. 42a-43a. Repudiated contract claimants have no claims against the bank but instead have a right to damages from the FDIC.

Fourth, the FDIC has the right to disallow creditors' claims if not proved to its satisfaction, and no judicial review of that determination is permitted. § 1821(d)(5), (6), (7), and (8), § 1821(d)(5)(E), App. 44a-47a. Not only does the FDIC have no right to "disallow" a claim for "actual direct compensatory damages", Congress clearly gave repudiated contract claimants the absolute right to payment of those damages and their right to sue for those damages, as petitioners have done, has never been challenged or questioned in the eleven years FIRREA has been on the books.

Fifth, Congress created and the FDIC promulgated a distribution priority for the amounts realized from the liquidation of the failed bank's assets, and there is no place in that priority for the payment of the FDIC's damages. App. 47a-48a.

Sixth, ordinary creditors must file their claims within a statutory window and with certain exceptions lose their right to collect if they fail to do so, and the FDIC has only 180 days after presentation to determine those claims. App. 42a-43a. The FDIC has a "reasonable" but statutorily unlimited time within which to act on repudiation. § 1821(e)(2).

And, seventh, while ordinary creditors are solely limited to recourse to the liquidated assets of the bank, the FDIC is liable to pay damages to the repudiated contract claimants. §§ 1821(e) and 1821(i), App. 47a-48a. (And see section II of this petition, *infra*.)

In short, ordinary trade creditors are given no more than the right to file a timely claim, the right to have the FDIC decide whether or not to approve that claim and the right to

participate as an approved claimant in the distribution of whatever assets remain of the failed bank. Indeed, it is a simple lexical fact that while one "distributes" the proceeds of liquidated assets ordinarily one does not "distribute" damages. To distribute is "to divide and dispense in portions". AMERICAN HERITAGE COLLEGE DICTIONARY 3D, *supra*, at 404. Nothing in the concept of "damages" is consistent with the concept of division of this limited *res*.

On the other hand, parties to the limited types of contracts described in § 1821(e) have one of two valuable rights, depending upon how the FDIC exercises its discretion. The FDIC may either assume or affirm such a contract, in which case the contracting party gets full performance of the contract and therefore its full value, or the FDIC may repudiate or disaffirm that contract, in which case the party to that repudiated contract is entitled to have "actual direct compensatory damages" from the FDIC.

The FDIC decided in the absence of any direction from Congress as to the mechanics of processing claims from repudiated contract claimants to do so in the same manner as it treats the § 1821(d) claims of ordinary creditors, and the courts have deferred to that practice in light of its evident practicality. *See, e.g., Heno v. FDIC*, 996 F.2d 429, 434 (1st Cir. 1993). But that fact neither justifies nor rationalizes the Ninth Circuit's decision to impose the monetary limits of § 1821(d) on the rights of claimants entitled to be made whole under § 1821(e).

Having made the FDIC, not the failed bank, liable for the payment of "damages" as contemplated in the common law it was unnecessary to make elaborate separate provision for their payment. The entire § 1821(d) distribution scheme

points to Congress' intent to restrict this elaborate process to the proof and satisfaction of ordinary creditors' claims against the bank, not the damages claims of claimants like petitioners. Congress must therefore have intended that "creditors" under § 1821(d) and parties to repudiated contracts under § 1821(e) be treated differently. If that distinction is to be honored, as it must be, the concept of "damages" must be accorded a different meaning than that of a mere right to participate in liquidated assets.

II.

THE NINTH CIRCUIT'S DECISION AUTHORIZES THE FDIC TO AVOID AN OBLIGATION THAT CONGRESS EXPRESSLY REQUIRED IT AND IT ALONE TO PAY.

If no court has felt it necessary heretofore to say directly that a right to damages means a right to money, no court appears ever to have found it necessary even to consider whether a government agency to which Congress has given an obligation could shift that obligation to someone else. Indeed, the idea that it is Congress and no one else who is entitled to decide what the Federal Government may do is so fundamental as to be almost subliminal and not susceptible to the usual research tools of the law. Nonetheless it falls on petitioners here to ask the Supreme Court of the United States to hold that when Congress makes an agency responsible for a monetary obligation that agency may not deflect its satisfaction of that obligation to an independent and separate source of recovery.

When it held that petitioners were required to stand in line with ordinary trade creditors to collect the actual direct compensatory damages that Congress gave them, the Ninth Circuit, without even acknowledging it, completely disregarded Congress' decision that those damages were a liability of the FDIC, as subsection 1821(e)(3)(A)(i) succinctly states. There is absolutely no reason why a liability for damages that Congress imposed on the FDIC may be paid from any other source.

The language of the statute is straightforward. "[T]he *liability of the conservator or receiver* for the disaffirmance or repudiation of any contract . . . shall be . . . limited to actual direct compensatory damages . . ." 12 U.S.C. § 1821(e)(3)(A)(i) (emphasis added). It is the FDIC, not the failed bank or its assets, that Congress made liable for damages.

An obligation that the FDIC incurs when it repudiates a contract is by no conceivable definition an obligation of anyone else. It is, instead, a direct claim against the FDIC that arises as a result of the exercise by the FDIC of its statutory discretion. Nowhere in § 1821(d) or § 1821(e) is the FDIC given the authority to pay claims against itself out of the proceeds collected for the bank's creditors under § 1821(d).

Nor does § 1821(i) provide such authority, as the Ninth Circuit erroneously believed. While subsection (i)(2) does contain the language on which that court relied, subsection (i)(1), not quoted, expressly provides that § 1821(i) governs the rights of the "creditors" *of the bank*, not claimants to whom the FDIC has been made liable. Since petitioners are not "creditors" of the bank but of the FDIC, that subsection is clearly not applicable to their rights. There is simply no statutory authorization to look to any other source of payment.

This conclusion, that the FDIC is liable for its own debts, is so obvious that no court has ever held anything different. Indeed, in dicta, the Tenth Circuit emphatically rejected the idea that a claim against the regulator may be treated as if it were a claim against the failed bank. *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269, 1275 (10th Cir. 1994), *accord*, in principle, *RTC v. Midwest Federal Savings*, 4 F.3d 1490, 1496 (9th Cir. 1993).

Other courts, not excluding the Ninth Circuit, have merely assumed and stated the obvious. *See, e.g., Monrad v. FDIC*, 62 F.3d 1169, 1174 (9th Cir. 1995) ("*FDIC*'s liability . . . under 12 U.S.C. § 1821(e)") (emphasis added), *FDIC v. Craft*, 157 F.3d 697, 703 (9th Cir. 1998) 703 ("when *it* [the FDIC] repudiates, *it* is liable for 'actual direct compensatory damages' carefully and precisely set out in the statute [subsections 1821(e)(1) and (3)]") (emphasis added), *OPEIU*, 27 F.3d at 601 ("the issue before us is the extent of the *FDIC*'s liability for damages") (emphasis added), *First Bank National Association v. FDIC*, 79 F.3d 362, 366 (3rd Cir. 1996) (under § 1821(e)(4) the *FDIC* is obligated to pay certain costs as rent but "not subject to any *liability*" for other related costs) (emphasis added).

This is not a trivial matter. Giving a party to a repudiated contract to whom Congress gave a right to damages from the FDIC a certificate payable out of the bank's assets shifts the FDIC's liability to the very limited pool that Congress clearly intended was to be reserved for all of the "creditors" of the failed bank. This recourse would harm the ordinary creditors, the repudiated contract claimants and the very process by which a failed bank is to be resolved.

Ordinary creditors would be hurt by having to share the almost invariably inadequate pool of proceeds with another class of claimant. Instead of the damages that Congress meant to make them whole, repudiated contract claimants would receive nothing, since there is no provision in the distribution priority in § 1821(d)(11) and its related FDIC regulation for them to receive any portion of the distributed assets of the failed bank. And the FDIC would have to manage two conflicting sets of claimants, trade creditors whose claims were required to be proven and approved within a relatively short statutory period, § 1821(d)(5), and repudiated contract claimants whose right to damages would not arise until the lapse of the "reasonable period" not set according to any defined statutory period, § 1821(e)(2), within which the FDIC may exercise its right to repudiate those contracts.

In fact, the only way to find that petitioners must look to the liquidated assets of the bank along with the ordinary creditors is to engage in a wholesale rewriting of § 1821. They would have to be given a place in the § 1821(d)(11) hierarchy of distribution, the "reasonable period" within which the FDIC may repudiate a contract would have to be eliminated in favor of the short deadlines contained in § 1821(d), and a federal agency would have to be allowed, for the first time in the history of the Republic, to pay damages claims that Congress imposed against it with monies from another source entirely.

The foregoing is, of course, an absurdity. In enacting § 1821, Congress provided separate sources of payment for each class of claimant. Repudiated contract claimants were given the right to damages from the FDIC. Ordinary creditors were given the right to payment out of bank assets. Depositors were given a right to payment from deposit

insurance funds under § 1821(f). Petitioners are no more entitled to be paid from the liquidated assets belonging to the ordinary creditors than they are from the deposit insurance fund made available solely to depositors. Petitioners are entitled to be paid their damages by the FDIC from its own resources and the FDIC is required to make that payment.

III.

THE DECISION BELOW VIOLATES THIS COURT'S HOLDING THAT CALIFORNIA LAW IS NOT GENERALLY PREEMPTED BY FIRREA

California has deemed it appropriate to require the payment of every type of employee benefits and wages in full and in cash. The Ninth Circuit and most other circuits have already held that these benefits are compensable as actual damages under § 1821(e). *Monrad*, 62 F.3d at 1174, *OPEIU*, 27 F.3d at 603-604.

Under California law, all benefits to which an employee is entitled as part of his or her compensation are considered "wages". *Department of Industrial Relations v. UI Video Stores, Inc.*, 64 Cal. Rptr. 2d 457, 461 (1997). Under California law, wages, including these other benefits, must be paid in cash without discount. Cal. Lab. Code § 212(a), and *see Triad Data Services v. Jackson*, 200 Cal. Rptr. 418, 423 (App. Dept. Supr. Ct. 1984). Nonetheless, the Ninth Circuit decision holds that FIRREA preempts California law, essentially reverting to a position that was rejected by this Court only a few years ago in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-89 (1994).

The Ninth Circuit's specific conclusion that California law was preempted was based upon its erroneous assumption that claims for damages under § 1821(e) are subject to the distribution priority of § 1821(d)(11)(A). As discussed, the idea that Congress enacted separate rights for separate classes of claimants in two co-equal code sections with the intent to make one section a subset of the other is simply incorrect. Fundamentally, however, this conclusion appears no less based on an unarticulated belief that there is a federal interest in denying the petitioners the payment of wages, as defined in California law, in cash, as required by California law.

Under the common law of California the term "damages" has the same universally understood meaning as is found in all other jurisdictions. *AIU Insurance Co. v. Superior Court*, 799 P.2d 1253, 1267-1268 (Cal. Sup. Ct. 1990) ("Definitions of 'damages' share several basic concepts. Each requires that there be 'compensation,' 'money,' 'recovered' by a party for 'loss' or 'detriment' it has suffered through the acts of another"). There is no interpretation of § 1821(e) that would make those damages that represent Petitioners' severance pay any less "wages" as understood by California law. Both Congress' and California's intentions are the same.

Moreover, Congress placed no limitation on the "actual direct compensatory damages" to which a party was entitled after repudiation by the FDIC of his or her contract, save that those damages not be punitive, for lost profits or for pain and suffering, none of which remotely characterizes the damages here. There is therefore no conceivable conflict between California's position and Congress' intent in § 1821(e). Clearly, Congress cannot be said to have occupied the field or to have preempted the application of California law requiring the payment of petitioners' severance and separation benefits in cash under California law.

It is also beyond question that, as this Court has numerous times held, in the absence of any express language to the contrary in FIRREA the matter is left subject to the requirements of state law. *O'Melveny*, 512 U.S. at 88. Indeed, in *O'Melveny* this Court held to the contrary, finding that the FDIC as receiver "steps into the shoes" of the failed financial institution, "to work out its claims under state law." 512 U.S. at 86.

There is therefore no preemption of California's statutory policy or petitioners' right to be paid in cash.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED NOVEMBER 2, 1999

Sandra Kay BATTISTA; Joan Renee Taylor; Douglas Fabbri; Laurie Lou Chandler; Sherry Leysen; Karen A. Marino; Patsy D. Thompson; Bobbie J. McNeil; Mary Marsicano; Shirley A. Van Buskirk; Erika Rivero; Robert B. Fatemick; Donald J. Bruyn; Annette Hanson; Julie C. Mazo; Constandeanna Elenie Wright; Glenda C. Moberg; Pamela A. Fairchild; Rebecca L. Smith; Cathy Lynn Fulton-Maloney; Harold Richard Norbrothen; Deborah Jane Tafoya; Carmen Razo; Robert Edward Steele; David S. Gordon; Linda Susan Aubin; Gilbert Fonseca; Mary Kellogg; Lisa M. Kelsey; Laura Lilly; Carole Meyers; James W. Pilgrim; Sarah E. Rodriguez; Nancy L. Shipman; Shawn Alison Shoemaker; Donna Smith; Jackie Todd; Courtney Wight; Cheryl C. Zweber; Carol Ann Okon; Lois A. Marcus; James L. Lauritzen; Valerie A. Hussey; Roberta L. Facchina; Ina Hahn; Diane Jo Allen; Tracy A. Allen; Carol Dignard; Hasmik Keyribaryan; Cathy Kiaha; George Klasser; Evodio Medina; Violette Naaman; Kimberly Jo Oliva; Hasmik Pashaie; Susan J. Rossi; Maria Del Carmen Contreras; John U. Crandall, III; Jan M. Eisenbeisz; Kyle Lance Miller,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Defendant-Appellee.

Appendix A

No. 97-56747.
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 13, 1999.

Decided Nov. 2, 1999.

* * *

Appeal from the United States District Court for the Central District of California; Gary L. Taylor, District Judge, Presiding. D.C. No. CV 95-00017 GLT.

Before: BOOCHEVER, O'SCANNLAIN, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

Sandra Kay Battista and other former employees (collectively "Battista" or "employees") of the Bank of Newport ("Bank") appeal an order of the district court that permitted the Federal Deposit Insurance Corporation ("FDIC") to pay a judgment to the employees in receiver's certificates rather than in cash. The employees also appeal the district court's refusal to award prejudgment interest. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

The Bank, a financial institution insured by the FDIC, had a severance policy that provided severance and

separation payments to employees terminated without just cause. In 1994, the California Superintendent of Banks declared the Bank insolvent and the FDIC was appointed its receiver. Pursuant to its authority under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), the FDIC repudiated the employees' contracts, including the agreements regarding severance and separation payments. The employees timely filed claims with the FDIC for their severance and separation payments, which the FDIC disallowed.

The employees brought suit against the FDIC seeking damages for their severance and separation pay, interest, and attorney's fees and costs. The parties entered into a Stipulated Pretrial Conference Order, in which they stipulated that a trial of the facts was unnecessary. In addition to agreeing on a number of facts, the parties stipulated to the FDIC's authority to repudiate the severance and separation pay agreements under FIRREA and to the resulting liability of the FDIC, as receiver, for damages under 12 U.S.C. § 1821(e)(3).[1] Two issues remained: (1) whether the employees were entitled to payment of the judgment in cash rather than in receiver's certificates; and (2) whether the FDIC was liable for prejudgment interest on the employees' damages.[2]

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1. All subsequent statutory references and citations are to Title 12, United States Code.

2. The collective judgment for the various employees, without interest, was $731,354.80.

The district court subsequently granted the FDIC's motion that it be allowed to satisfy the judgment by payment with receiver's certificates and that the employees were not entitled to prejudgment interest, and entered judgment against the FDIC.[3] The employees timely appealed.

II.

The interpretation of a statute is a question of law reviewed de novo. See Alexander v. Glickman, 139 F.3d 733, 735 (9th Cir.1998). Whether prejudgment interest is permitted is a question of law reviewed de novo. See Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921 (9th Cir.1995).

III.

Congress enacted FIRREA in 1989 in response to the nation's banking crisis. See Sharpe v. FDIC, 126 F.3d 1147, 1154 (9th Cir.1997). The statute "allows the FDIC to act as receiver or conservator of a failed institution for the protection of depositors and creditors," id., establishing a scheme for dealing with claims against the failed institution.

Section 1821(d) of FIRREA outlines the powers and duties of the FDIC as conservator or receiver, authorizing the agency to, inter alia, determine and pay claims against the financial institution in accordance with the subsection's requirements. Subsections 1821(d)(3)-(6) set forth the procedures for the determination of claims, and § 1821(d)(11) establishes a distribution priority for claims to the financial institution's assets.

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3. The employees' motion for reconsideration was denied.

Appendix A

Subsection 1821(e) authorizes the FDIC, as receiver, to repudiate any contract of the insolvent financial institution it deems burdensome, so long as the repudiation of the contract will promote the orderly administration of the financial institution's affairs, see § 1821(e)(1), and the repudiation is made within a reasonable time of the receiver's appointment, see § 1821(e)(2). Repudiation gives rise to an ordinary contract claim for damages. See Howell v. FDIC, 986 F.2d 569, 571 (1st Cir.1993). FIRREA, however, limits damages for repudiation to those enumerated in § 1821(e)(3): "actual direct compensatory damages" determined as of "the date of the appointment of the conservator or receiver."[4] The

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4. Subsection 1821(e)(3) provides:

(A) In general

Except as otherwise provided in subparagraph (c) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of —

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(Cont'd)

question we must decide is whether a claim for damages under § 1821(e) based on a repudiated contract is subject to the payment scheme outlined in § 1821(d), or whether, as Battista claims, subsection (e) establishes a separate right to payment.

A.

There is no question that the FDIC may pay creditors with receiver's certificates instead of with cash. See RTC v. Titan Fin. Corp., 36 F.3d 891, 892 (9th Cir.1994) (per curiam). Section 1821(d)(10)(A) authorizes the FDIC, as receiver, to "pay creditor claims . . . in such manner and amounts as are authorized under this chapter." In Titan, we reasoned that the FDIC may use receiver's certificates as its manner of payment because requiring cash payments would subvert the comprehensive scheme of FIRREA, including § 1821(i)(2)'s limitation on an unsecured general creditor's claim to only a pro rata share of the proceeds from the

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(Cont'd)

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

§ 1821(e)(3)(A)-(B).

liquidation of the financial institution's assets. See Titan, 36 F.3d at 892 (citing Franklin Bank v. FDIC, 850 F.Supp. 845 (N.D.Cal.1994)). To require the FDIC to pay certain creditors in cash would allow those creditors to "jump the line," recovering more than their pro rata share of the liquidated assets, if the financial institution's debts exceed its assets. See id. (quoting Franklin Bank, 850 F.Supp. at 849).

Attempting to extricate her case from Titan 's seemingly dispositive holding, Battista argues that § 1821(d) does not govern situations in which the FDIC has repudiated a contract pursuant to § 1821(e). Specifically, she argues that Congress established two different types of claims: (1) approved claims under § 1821(d), which are payable with receiver's certificates from the assets of the financial institution; and (2) damages for repudiation under § 1821(e), which are payable only in cash. Analyses of § 1821's text, a related FDIC regulation, and case law, however, point to the conclusion that § 1821(e) is better interpreted as being subject to the various provisions of § 1821(d).

1. Section 1821's Plain Language

Contrary to Battista's argument, little in § 1821 indicates that Congress intended to establish two distinct types of non-depositor claims, beyond the fact that Congress provided for damages for repudiation in subsection (e), while discussing the claims payment process in subsection (d).

Battista points to the different time lines established in §§ 1821(d) and (e) for the making of claims. She notes that while § 1821(d) requires creditors to file claims within a

specified period of time after receiving notice of the financial institution's liquidation, see § 1821(d)(3)(B)(i), and requires the FDIC to approve or reject those claims within 180 days of their filing, see § 1821(d)(5)(A)(i), the FDIC need only repudiate a contract under § 1821(e) within a "reasonable period" following its appointment as receiver, § 1821(e)(2). From this difference, Battista concludes that § 1821(e) creates a "full-blown absolute right to seek damages for the repudiation."

Battista also argues that Congress must have created two types of claims because § 1821(d) speaks in terms of "approved claims" or "disallowed claims," while § 1821(e) refers only to "claims for damages." According to Battista, the principle of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion," Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (citation omitted) (internal quotation marks omitted), requires us to find that damages, which are not mentioned in § 1821(d), are not included within § 1821(d)'s framework.

The absence of specific deadlines or references to "approved" or "disallowed claims" in § 1821(e), however, also supports the contrary conclusion that § 1821(e) does not establish a separate regime from § 1821(d). There is no reason to repeat § 1821(d)'s requirements in § 1821(e), if § 1821(e) claims are to be dealt with under § 1821(d).[5]

5. The same response can be made to Battista's argument that Congress must not have intended damages under § 1821(e) to be (Cont'd)

Similarly, Congress had no reason to speak of "approved claims" or "disallowed claims" in § 1821(e), if subsection (e)'s function was only to limit the damages that a claimant could seek for repudiation — damages that would either be approved or disapproved under the scheme established in subsection (d). That is, damages in § 1821(e) are merely a subset of the claims discussed in § 1821(d). This interpretation of § 1821 is more plausible than Battista's for several reasons.

First, if Congress had wished to depart from the § 1821(d) regime for claims for damages under § 1821(e), presumably it would have said so. In fact, it did just that in § 1821(f) with respect to the payment of insured deposits:

> In case of the liquidation of . . . any insured depository institution, payment of the insured deposits . . . shall be made by the Corporation as soon as possible . . . either by cash or by making available to each depositor a transferred deposit in a new insured depository institution . . . in an amount equal to the insured deposit of such depositor, except that —
>
> (A) all payments made pursuant to this section on account of a closed Bank Insurance Fund

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(Cont'd)
paid from the financial institution's assets because § 1821(e) does not state that damages are to be so paid. Subsection (e)'s silence is equally interpretable as evidence that Congress intended such claims to be resolved pursuant to subsection (d).

> member shall be made only from the Bank Insurance Fund. . . .

§ 1821(f)(1).

Second, it is unlikely that Congress would have provided such extensive guidelines for claims under § 1821(d) but neglected to even mention the presentation and payment of claims under § 1821(e), if it had intended for the two subsections to be mutually exclusive.

Third, Congress has limited the FDIC's liability, as a receiver, to the assets of the insolvent financial institution, unless the FDIC chooses to make additional payments from the Bank Insurance Fund:

> The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver of the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution. . . .

§ 1821(i)(2). Subsection 1821(i) gives no indication that its provisions are limited to claims under § 1821(d).

Fourth, the distribution priority in § 1821(d)(11)(A), which was added to § 1821 in 1993, makes little sense if parties injured by repudiations under § 1821(e) are treated separately from parties with claims under § 1821(d). Section 1821(d)(11)(A) provides, in relevant part:

Appendix A

> Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:
>
> (i) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not a liability in clause (iv) or clause (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

§ 1821(d)(11)(A). This provision does not mention claims based on damages for repudiation. If claims under § 1821(e) were to be treated differently from claims under § 1821(d), however, one would have expected Congress to have given § 1821(e) claims a place in § 1821(d)(11)'s hierarchy. After all, § 1821(d)(11) includes depositors, for whom § 1821(f)

establishes a separate track for the making and paying of claims.[6]

In sum, the text of § 1821 strongly suggests that § 1821(e) claims are subject to the distribution priority scheme of § 1821(d).

2. FDIC Regulations

FDIC regulations regarding the definition of administrative expenses in § 1821(d)(11) also support this conclusion. Agency interpretations of this sort deserve significant deference. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme

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6. We note also that § 1821(e) expressly requires the application of § 1821(d) and (i) to the repudiation of a service contract. Although the term "service contract" is not defined in the statute, it may well include a contract for severance pay because severance pay is part of the compensation package that constitutes an employee's wages. Cf. Monrad v. FDIC, 62 F.3d 1169, 1173-74 (9th Cir.1995) (finding severance payments to constitute consideration for employee's entering into an at will employment relationship); Office & Prof'l Employees Int'l Union v. FDIC, 27 F.3d 598, 603-04 (D.C.Cir.1994) (same). Thus, this factor also appears to support construing § 1821(e) claims as being subject to the distribution scheme of § 1821(d). Because we conclude that § 1821(e) contract repudiation claims are subject to the distribution scheme of § 1821(d), we need not decide today whether a severance pay claim is a claim "for services performed before the appointment of . . . the receiver" under § 1821(e)(7).

it is entrusted to administer") (footnote omitted); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (agency's interpretation of its own regulations must also be given "substantial deference" and is to be disregarded only if "it is plainly erroneous or inconsistent with the regulation") (citation omitted) (internal quotation marks omitted).

Under § 1821(d)(11)'s distribution priority, the receiver's administrative expenses are paid ahead of all other claims. See § 1821(d)(11)(A)(i). In 1993, the FDIC promulgated an interim rule, which was fully adopted in 1995 as 12 C.F.R. § 360.4 (1999), that defines "administrative expenses" as including "those necessary expenses incurred by the receiver in liquidating . . . a failed insured depository institution. Such expenses shall include pre-failure and post-failure obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the institution." Significantly, the FDIC noted in its discussion of the interim rule that administrative expenses "[g]enerally . . . do not include expenses such as severance pay claims, golden parachute claims and claims arising from contract repudiations." 58 Fed.Reg. 43,069, 43,070 (1993). Thus, the FDIC interpreted § 1821(d)(11)'s priority scheme as including claims for damages arising from contract repudiation under § 1821(e), but not entitled to the same priority as administrative claims.

3. Case Law

Battista contends that there is no case law establishing that damages claims under § 1821(e) are equivalent to other

creditor's claims under § 1821(d). The FDIC argues, in contrast, that it is well-established that claims against the FDIC for actions taken in its capacity as receiver must comply with the administrative process established in § 1821(d)(3)-(6), thereby suggesting that the two types of claims are not distinct.

Battista relies on our decision in Sharpe, in which we considered whether parties aggrieved by the FDIC's breach of a contract held a § 1821(d) "claim" that would be subject to FIRREA's administrative exhaustion requirement. We concluded that they were not subject to the § 1821(d) claims process; however, we expressly noted the difference between the FDIC's breaching a contract and repudiating a contract. See Sharpe, 126 F.3d at 1157 ("Had the FDIC followed the § 1821(e) procedure in disaffirming the settlement agreement with the Sharpes, this would have been a very different case.").[7] Thus, contrary to Battista's contention, Sharpe did not hold that claimants whose contracts had been repudiated were not subject to the claims process of § 1821(d).

Monrad v. FDIC, 62 F.3d 1169 (9th Cir.1995), and Heno v. FDIC, 20 F.3d 1204 (1st Cir.1994), upon which Battista also relies, offer no help. Monrad held only that the FDIC is liable for severance payment damages when it repudiates an employment contract, a question that is not at issue here. See Monrad, 62 F.3d at 1172. And Heno does not address

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7. We left open in Sharpe the question of whether § 1821(e) is subject to § 1821(d)'s exhaustion requirement. See 126 F.3d at 1157 n. 7. Whether claims under subsection (e) must satisfy the jurisdictional bar is immaterial here because Battista exhausted the administrative claims process.

whether a § 1821(e) claim for damages is subject to the § 1821(d) process; in fact, it seems to assume in dicta that it is. See Heno, 20 F.3d at 1209 (including contract repudiation claims in its discussion of the FDIC's ability to evaluate claims submitted after the statutory bar date in § 1821(d)(5)).

Battista further argues that the district court erred by concluding that FIRREA preempts California law that requires all wages to be paid in cash.[8] This argument, however, ultimately rests on the assumption that claims for damages under § 1821(e) are not subject to the distribution priority of § 1821(d)(11)(A). Because we conclude to the contrary, this argument fails.

Section 1821(d)(11)(B)(i) notes that the distribution priority established in subparagraph (A) "shall not supersede

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8. Battista relies on two provisions of the California Labor Code: (1) The first defines "wages" as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertainable by the standard of time, task, piece, commission basis, or other method of calculation." Cal. Lab.Code § 200(a) (West 1999).(2) The second provides that payments of wages must be "negotiable and payable in cash, on demand, without discount." Cal. Lab.Code § 212(a). California law treats severance pay as wages. See Triad Data Servs. v. Jackson, 153 Cal.App.3d Supp. 1, 200 Cal.Rptr. 418, 423 (App. Dep't Supr. Ct.1984) ("[P]ursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as part of his compensation.") (internal quotation marks omitted) (citation omitted). It is not entirely clear, however, that California courts would apply § 212(a) to severance pay.

the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency." Requiring the FDIC to pay Battista's judgment in cash surely would be inconsistent with the distribution priority in § 1821(d)(11)(A). It would, as the FDIC correctly contends, "in effect elevate those whose severance contracts the FDIC as receiver has repudiated to the super priority status that Congress accorded only to administrative expenses." Claimants under § 1821(e) would be guaranteed payment in full, while other claimants would be limited to their share of whatever bank assets were left over.

In light of the text of § 1821, FDIC regulations, relevant case law, and the preemption of possibly contradictory state law, we conclude that the district court did not err in refusing to require the FDIC to pay Battista's judgment in cash.

B.

The employees also argue that they are entitled to prejudgment interest on the amount of their judgment. In Far West Fed. Bank, S.B. v. Office of Thrift Supervision-Dir., 119 F.3d 1358 (9th Cir.1997), however, we held that sovereign immunity bars an award of interest against the FDIC. Congress has not expressly waived the FDIC's immunity against prejudgment interest, nor does the FDIC fall under the exception of the government's waiver immunity when it operates as a commercial enterprise. See id. at 1366-67. We therefore conclude that the district court did not err in refusing to grant the employees prejudgment interest.

The employees argue that Far West is both distinguishable and wrongly decided. They argue, first, that Far West is distinguishable from this case because Far West did not involve liability arising from the FDIC's actions as a receiver under § 1821(e), which, according to them, take on more of the character of a private enterprise. Far West, however, did not limit the FDIC's immunity to certain actions; instead, it characterized the agency as a "governmental, regulatory entity . . . not a profit-making enterprise," and, therefore, "not a commercial entity." Id.; see also Sharpe, 126 F.3d at 1154 n. 3 (barring prejudgment interest against the FDIC based on sovereign immunity). We fail to see any reason to treat the FDIC's repudiation of a contract under § 1821(e) differently from its abrogation of certain forbearance agreements pursuant to other sections of FIRREA in Far West.

The employees also argue that Far West was wrongly decided. That contention, however, fails because a three-judge panel does not have the authority to overturn the decision of a prior panel. See Branch v. Tunnell, 14 F.3d 449, 456 (9th Cir.1994).[9]

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9. The intervening case of O'Melveny & Myers v. FDIC, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), does not undermine Far West 's holding. Cf. Branch, 14 F.3d at 456 (noting an exception to the rule that a panel may not reconsider the decision of another panel when there has been an intervening Supreme Court decision that "undermines the existing precedent . . . and both cases are closely on point") (internal quotation marks omitted) (citation omitted). In O'Melveny, the Supreme Court noted merely that FIRREA "places the FDIC in the shoes of the insolvent S & L, to

(Cont'd)

IV.

Because § 1821(e) is better interpreted as subjecting claims for damages for contract repudiation to the claims process of § 1821(d), and to the distribution priority in § 1821(d)(11) in particular, our decision in Titan permitting the FDIC to pay claims with receiver's certificates applies to repudiated severance pay claims. Therefore, the district court did not err in refusing to require the FDIC to pay the employees' judgment in cash. Furthermore, under Far West, the district court did not err in refusing to award the employees prejudgment interest. Accordingly, the judgment of the district court is

AFFIRMED.

(Cont'd)
work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." O'Melveny, 512 U.S. at 87, 114 S.Ct. 2048. It did not suggest that the FDIC was like a private enterprise for purposes of sovereign immunity.

APPENDIX B — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN RE PLAINTIFF'S MOTION FOR RECONSIDERATION DATED NOVEMBER 3, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. SA CV 95-17 GLT(EEx)
SA CV 95-53 GLT(EEx)
Date 11/3/97

Title: SANDRA KAY BATTISTA, et al. v. FEDERAL DEPOSIT INSURANCE CORPORATION

* * *

PRESENT:

HON. Gary L. Taylor JUDGE

Kathleen Peterson	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: MINUTE ORDER in re: PLAINTIFF'S MOTION FOR RECONSIDERATION

Appendix B

Having read and considered the submitted papers, the Court will construe them as a Motion for Reconsideration governed by Local Rule 7.16.[1] Plaintiff's Motion is DENIED.

A motion for reconsideration is proper when there is an issue of fact or law materially different from that previously presented, a new material fact or a change of law has arisen since the decision, or there is a manifest showing of a failure to consider material facts. Here, plaintiffs have simply repeated the arguments previously made in their written opposition and oral argument.

Much of plaintiffs re-argument is based upon *Sharpe v. FDIC*, __ F.3d __, 97 Daily Journal D.A.R. 12075 (9th Cir. Sept. 19, 1997).[2] Plaintiffs construe this Court's order as finding the FDIC is "always entitled to pay repudiated contract damages in receivers' certificates." Motion at 4. This is an overstatement. Certainly, when the FDIC acts outside its FIRREA authority a court can hold the FDIC directly liable. *See Sharpe*, 97 D.A.R. at 12079; *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269 (10th Cir. 1994). Since here the FDIC acted within its authority, the reasoning cited by

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1. Plaintiffs have entitled the pending motion a motion for reconsideration made pursuant to Fed.R.Civ.P. 59(e). Rule 59(e), however, governs "Motion[s] to Alter or Amend a Judgment." This court's October 1, 1997 order is not a judgment, nor has final judgement been entered in this case.

2. This case was discussed by the parties during oral argument and considered by the Court prior to issuing its order. In fact, by letter dated September 24, 1997, plaintiffs advised this Court they "intend[ed] to refer to . . . *Sharpe* . . . in oral argument.

plaintiffs is inapplicable. *Sharpe*, 97 D.A.R. at 12079 (stating "[h]ad the FDIC followed the § 1821(e) procedure in disaffirming the settlement agreement with the Sharpes, this would have been a different case.").

The Ninth Circuit has held receivers certificates may be used as payment when the FDIC has acted within their FIRREA authority. *See RTC v. Titan Financial Corporation*, 36 F.3d 891, 892 (9th Cir. 1994). Here, payment through receivers certificates is proper. The motion for reconsideration is DENIED. The hearing scheduled for November 10, 1997 is taken off calendar.

Initials of Deputy Clerk s/ RGP

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING DEFENDANT'S MOTION FOR ORDER THAT JUDGMENT BE SATISFIED IN RECEIVER CERTIFICATES AND PLAINTIFFS ARE NOT ENTITLED TO PREJUDGMENT INTEREST DATED AND FILED SEPTEMBER 29, 1997 AND ENTERED OCTOBER 1, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 95-17-GLT (EEx)
SA CV 95-53-GLT (EEx)

SANDRA KAY BATTISTA, et al.

Plaintiffs

vs.

FDIC,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ORDER THAT JUDGMENT BE SATISFIED IN RECEIVER CERTIFICATES AND PLAINTIFFS ARE NOT ENTITLED TO PREJUDGMENT INTEREST

Calendar Item #14

Defendant's Motion for Order that Judgment be Satisfied by Payment of Receiver Certificates is GRANTED. Defendant's Motion for Order that Plaintiffs are Not Entitled to Prejudgment Interest is GRANTED.

Appendix C

I. *Priority of Debtors*

Plaintiffs contend the FDIC should pay them in cash for losses caused by repudiation of pre-receivership contracts. First, plaintiffs assert § 1821(e) governs this dispute and authorizes direct compensatory payment. In the alternative plaintiffs contend the wage and employment priorities set forth under California law govern this case.

A. *Section 1821(e) Does Not Mandate Cash Payment, Rather Cash Payment is At the Discretion of the FDIC*

The FDIC is empowered to repudiate any contract that it deems advisable, but upon such repudiation it is liable for damages. Accordingly, plaintiffs sued under § 1821(e), established liability under § 1821(e), and the FDIC has stipulated it is liable under § 1821(e). Subsection 1821(e) provides parties to repudiated contracts or leases have a claim for damages.

However, § 1821(e) does not specify how these damages are to be paid. By asking for the damages in cash, not receiver certificates, plaintiffs are, in effect, asking to be paid ahead of other debtors.

Through the National Depositor Preference law, Congress has already limited the types of payments that a receiver may make ahead of general deposit liabilities. P.L. 103-66, 107 Stat. 312 (1993), codified as 12 U.S.C. § 1821(d)(11). Although the Debtor Preference law does not directly address damages under § 1821(e), the law does

expressly delegate discretion to the FDIC to identify and pay critical expenses.

Under this discretion, Congress charges the FDIC with authority to identify which debts of a failed bank may properly be regarded as so critical to the orderly administration of the receivership estate as to be immediately payable in cash as administrative expenses. This discretion is not unusual since it is generally within the power of an administrative agency to formulate policy and make rules to fill any gap left by Congress. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Accordingly, in August 1993, the FDIC Board of Directors determined that cash payments of severance and separation payments are not necessary for the orderly administration of a failed bank. The Board announced that determination as Rule No. 3064-AB25, published in the Federal Register, and codified as 12 C.F.R. 360.4. Therefore, the presumption is that severance and separation payments, even when they take the form of damages flowing from repudiated contracts, do not take automatic priority.

In this case, the FDIC has chosen not to depart from the presumption that repudiated contract damages do not merit cash, i.e., priority, payment. Accordingly, as general unsecured creditors, plaintiffs should receive payment in receiver certificates. Defendant's motion for such an order is GRANTED.

Appendix C

B. *Preemption*

Plaintiffs alternatively contend California law, which gives priority to severance and separation benefits, governs this case. Generally, "[s]tatutorially authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *New York v. FCC*, 486 U.S. 57, 64 (1988). Specifically, preemption occurs when Congress expressly so provides in a federal state; when there is a conflict between federal and state law; when compliance with both federal and state law is impossible; when there is an implicit barrier in the federal statute to state regulation; when Congress has comprehensively occupied the entire field and leaves no room for state law; or when state law is an obstacle to the objectives and purposes of Congress. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986) .

Here, Congress has expressed an intent to preempt "inconsistent" state law. FIRREA provisions "shall not superseded the law of any State except to the extent such law is inconsistent with the provisions [of the FIRREA]." § 1821(d)(11). Therefore, to the extent that any law of California is inconsistent with FIRREA, it is preempted.

Allowing California priorities to determine whether the FDIC pays the plaintiffs in cash or receiver certificates would directly conflict with federal law. Congress, through the National Depositor Preference law, has spoken about who should receive priority over general creditors, and has chosen not to give priority to wage and employment claims. In the absence of express priority, Congress has given the FDIC

discretion to identify which debts of a failed bank may properly be regarded as "critical," and thus immediately payable. Accordingly, FDIC discretion preempts state law priorities.

II. *Prejudgment Interest*

After the filing of this motion, the Ninth Circuit held that the FDIC is not subject to a pre-judgment interest award. *Far West Federal Bank, S.B. v. Office of Thrift Supervision Director*, __ F.3d __ (July 10, 1997) (97 Daily Journal D.A.R. 8851, 8855). Therefore, the motion for an order that plaintiffs are not entitled to prejudgment interest is GRANTED.

Disposition

For all the foregoing reasons, Defendant's Motion for Order that Judgment be Satisfied by Payment of Receiver Certificates is GRANTED. Defendant's Motion for Order that Plaintiffs are Not Entitled to Prejudgment Interest is GRANTED.

DATED: 9/29/97

s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX D — STIPULATED PRETRIAL CONFERENCE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION DATED AND FILED SEPTEMBER 17, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. SA CV 95-17 GLT (EEx)

Consolidated With:
No. SA CV 95-53 GLT (EEx)

SANDRA KAY BATTISTA, etc., et al.,

Plaintiffs,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed Receiver of Bank of Newport, a failed depository institution,

Defendants.

CAROLE OKON, etc., et al.,

Plaintiffs,

vs.

Appendix D

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed Receiver of Bank of Newport, a failed depository institution,

Defendants.

STIPULATED
PRETRIAL CONFERENCE ORDER

Pretrial Conference:
August 11, 1997

Following pretrial proceedings pursuant to Rule 16, F.R.Civ.P., and C.D.Cal. Local Rule 9, and pursuant to stipulation between the parties hereto in lieu of the memoranda of contentions of fact and law required by C.D.Cal. Local Rule 9.5, IT IS ORDERED:

1. The parties are:

Plaintiffs in No. SA CV 95-17 GLT are SANDRA KAY BATTISTA, JOANNE RENEE TAYLOR, DOUGLAS FABBRI, LAURIE LOU CHANDLER, SHERRY LEYSEN, KAREN A. MARINO, PATSY D. THOMPSON, BOBBIE J. MCNEILL, MARY MARSICANO, SHIRLEY A. VAN BUSKIRK, ERIKA RIVERO, ROBERT B. FATERNICK, DONALD J. BRUYN, ANNETTE HANSON, JULIE C. MAZO, CONSTANDEANNA ELENIE WRIGHT, GLENDA C. MOBERG, PAMELA A. FAIRCHILD, REBECCA L. SMITH, CATHY LYNN FULTON-MALONEY, HAROLD RICHARD NORBROTHEN, DEBORAH JANE TAFOYA, CARMEN RAZO, ROBERT

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EDWARD STEELE, DAVID S. GORDON, LINDA SUSAN AUBIN, GILBERT J. FONSECA, MARY KELLOGG, LISA M. KELSEY, LAURA LILLY, CAROLE MEYERS, JAMES W. PILGRIM, SARAH E. RODRIGUEZ, NANCY L. SHIPMAN, SHAWN ALISON SHOEMAKER, DONNA SMITH, JACKIE TODD, COURTNEY WIGHT, CHERYL C. ZWEBER, RONALD B. HAYWARD, MARY K. BAN and JOANNE M. FISH.

Plaintiffs in No. SA CV 95-53 are CAROL ANN OKON, LOIS A. MARCUS, JAMES L. LAURITZEN, VALERIE A. HUSSEY, ROBERTA L. FACCHINA, INA HAHN, DIANE JO ALLEN, TRACY A. ALLEN, CAROL DIGNARD, HASMIK KEYRIBARYAN, CATHY KIAHA, GEORGE KLASSER, EVODIO MEDINA, VIOLETTE NAAMAN, KIMBERLY JO OLIVA, HASMIK PASHAIE, SUSAN J. ROSSI, MARIA DEL CARMEN CONTRERAS, JOHN U. CRANDELL III, JAN M. EISENBEISZ, KYLE LANCE MILLER, DOREEN MURDOCK and JULIE K. LUNGO.

Defendant in both actions is FEDERAL DEPOSIT INSURANCE CORPORATION, appointed Receiver of Bank of Newport, a failed depository institution.

The defendant was served and has appeared, and there are no unserved defendants.

The pleadings that raise the issues are the Third Amended Complaint in No. SA CV 95-17 GLT and the Second Amended Complaint in No. SA CV 95-53 GLT, and defendant's answers to those complaints.

2. Federal jurisdiction and venue are invoked on the basis of 12 U.S.C. § 1821(d)(6)(A) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") and 28 U.S.C. § 1391(e).

3, 4. No trial of facts will be necessary but there are disputes as to two legal issues, whether defendant is liable to pay pre-judgment interest on plaintiffs' damages, and whether the judgment creditors are entitled to payment of the judgment for damages in cash rather than by Receiver's Certificates. Those issues will be presented by motion as provided in this stipulation.

5. The following facts are admitted, require no proof and are binding on the parties:

(a) BANK OF NEWPORT ("BANK") was a banking institution chartered by the State of California with its principal place of business in Newport Beach, California, and at all times its deposits were insured by the FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC").

(b) Each of the plaintiffs was an employee of BANK on August 12, 1994.

(c) At all relevant times, BANK had a policy that provided that each employee who was terminated other than for cause was entitled to receive severance and separation payments in consideration of his or her employment with BANK.

(d) On August 12, 1994, BANK was closed by the Superintendent of Banks of the State of California, and FDIC

was appointed as receiver with the rights, powers, duties and obligations conferred by law.

(e) On August 12, 1994, when FDIC assumed control of BANK and its assets, plaintiffs had an enforceable contractual right to severance and separation payments.

(f) After BANK was closed, each plaintiff duly executed and timely filed with FDIC its executed claim form demanding payment of his or her severance and separation payments pursuant to the official policy described herein, except plaintiffs EVODIO MEDINA, JOANNE M. FISH and MARY K. BAN.

(g) Defendant FDIC repudiated the contract of each plaintiff pursuant to 12 U.S.C. § 1821(e), by letter timely mailed to and received by each plaintiff, on the stated ground that the severance and separation payments provided by contract between BANK and each plaintiff were not unconditionally fixed and accrued on or before BANK was placed into receivership. The letters specified no other basis for repudiation.

(h) FDIC, as receiver, had the authority to repudiate the contracts described herein, but is liable under *Monrad v. FDIC*, 62 F.3d 1161, 1172 (9th Cir. 1995) and 12 U.S.C. § 1821(e)(3) for damages resulting from the repudiated severance and separation contracts to each plaintiff who filed a timely claim.

(i) Plaintiffs are each individually entitled to judgment for damages from defendant FDIC in the following principal amounts:

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SANDRA K. BATTISTA in the sum of $24,877.44;

JOAN RENEE TAYLOR in the sum of $8,884.54;

DOUGLAS FABBRI in the sum of $18,092.34;

LAURIE LOU CHANDLER in the sum of $5,538.40;

SHERRY LEYSEN in the sum of $2,250.00;

KAREN A. MARINO in the sum of $5,384.64;

PATSY D. THOMPSON in the sum of $16,635.00;

BOBBIE J. MCNEILL in the sum of $2,750.00;

MARY MARSICANO in the sum of $4,000.00;

SHIRLEY A. VAN BUSKIRK in the sum of $18,489.88;

ERIKA RIVERO in the sum of $6,000.48;

ROBERT B. FATERNICK in the sum of $10,149.86;

DONALD J. BRUYN in the sum of $24,648.84;

ANNETTE HANSON in the sum of $9,423.12;

JULIE C. MAZO in the sum of $8,075.20;

CONSTANDEANNA ELENIE WRIGHT in the sum of $24,432.90;

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GLENDA C. MOBERG in the sum of $31,585.68;

PAMELA A. FAIRCHILD in the sum of $18,050.70;

REBECCA L. SMITH in the sum of $8,151.80;

CATHY LYNN FULTON-MALONEY in the sum of $3,138.40;

HAROLD RICHARD NORBROTHEN in the sum of $3,066.96;

DEBORAH JANE TAFOYA in the sum of $12,055.20;

CARMEN RAZO in the sum of $8,641.03;

ROBERT EDWARD STEELE in the sum of $11,888.80;

DAVID S. GORDON in the sum of $6,634.60;

LINDA SUSAN AUBIN in the sum of $1,615.39;

GILBERT J. FONSECA in the sum of $3,440.00;

MARY KELLOGG in the sum of $15,667.20;

LISA M. KELSEY in the sum of $18,803.12;

LAURA LILLY in the sum of $5,400.00;

CAROLE MEYERS in the sum of $3,379.12;

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JAMES W. PILGRIM in the sum of $19,998.40;

SARAH E. RODRIGUEZ in the sum of $13,093.74;

NANCY L. SHIPMAN in the sum of $4,800.00;

SHAWN ALISON SHOEMAKER in the sum of $2,076.90;

DONNA SMITH in the sum of $4,000.00;

JACKIE TODD in the sum of $5,678.96;

COURTNEY WIGHT in the sum of $2,700.00;

CHERYL C. ZWEBER in the sum of $6,923.04;

RONALD B. HAYWARD in the sum of $8,307.68;

CAROL ANN OKON in the sum of $14,573.10;

LOIS A. MARCUS in the sum of $9,382.08;

JAMES L. LAURITZEN in the sum of $51,154.00;

VALERIE A. HUSSEY in the sum of $4,695.30;

ROBERTA L. FACCHINA in the sum of $36,346.32;

INA HAHN in the sum of $30,746.32;

DIANE JO ALLEN in the sum of $13,013.00;

TRACY A. ALLEN in the sum of $27,686.40;

CAROL DIGNARD in the sum of $17,791.76;

HASMIK KEYRIBARYAN in the sum of $6,000.00;

CATHY KIAHA in the sum of $10,449.60;

GEORGE KLASSER in the sum of $16,153.85;

VIOLETTE NAAMAN in the sum of $7,291.76;

KIMBERLY JO OLIVA in the sum of $4,995.24;

HASMIK PASHAIE in the sum of $4,650.00;

SUSAN J. ROSSI in the sum of $35,384.58;

JOHN U. CRANDELL III in the sum of $1,900.00 or $1,753.84;

MARIA DEL CARMEN CONTRERAS in the sum of $3,737.92;

JAN M. EISENBEISZ in the sum of $11,115.04;

KYLE LANCE MILLER in the sum of $11,666.72;

DOREEN MURDOCK in the sum of $6,257.52;

JULIE K. LUNGO in the sum of $7,714.74 or $7,500.00.

Appendix D

Disputed amounts will be resolved by the parties before judgment is entered.

6. FDIC will concurrently file the declaration of Joyce Yamasaki and its attached exhibits, and an authenticated copy of Exhibit 1 and 2 to the Yamasaki declaration. Plaintiffs have the right to make any objection to the use or interpretation of the declaration and/or the exhibits including, but not limited to, objections based on competence, relevance and admissibility, but not the ground of hearsay. Except as provided in this paragraph, this stipulation dispenses with the presentation of evidence in this action.

7. The following contentions are in dispute. FDIC will assert no defenses to any contentions recited in this stipulation except as stated in this paragraph.

(a) Plaintiffs contend that each plaintiff was an employee of BANK who was terminated on August 12, 1994, and who had a vested right as of that date to the payment of severance and separation pay pursuant to the policy of BANK applicable to all terminated employees. It is the position of the FDIC that such contention is irrelevant and should not be considered by this Court (because FDIC has already admitted liability for said breach of contract) and that proof of additional facts is unnecessary for the determination of the rights of the parties regarding method of payment of the judgment. For this reason and solely for the limited purpose of the determination of its motion, and denying the facts for all other purposes, the FDIC will neither challenge nor admit the truth of the matter asserted by

plaintiffs in this paragraph, and will contend that regardless of their merit or veracity such facts are irrelevant and immaterial to the issue of priority of payment to various creditors of the receivership. Plaintiffs deny that priority of payment is an issue an stated by FDIC.

(b) Plaintiffs further contend that under the authority of *Monrad v. FDIC*, *supra*, the severance and separation payments at issue here are pay or wages. FDIC contends that the severance and separation payments are benefits, not pay or wages.

(c) Plaintiffs further contend that they are entitled to pre-judgment interest on the damages awarded in the judgment; FDIC contends that they are not.

(d) Plaintiff DONALD J. BRUYN claims entitlement to $8,902.40 in vacation pay that was not paid to him at closure of the BANK, but that was included in his claim filed with FDIC and never denied. The parties will attempt to resolve this issue between themselves.

8. All discovery is complete.

9. There are no exhibits to be used except as provided in paragraph 6 of this stipulation.

10. There are no witnesses to be called.

11. There is no deposition testimony to be used.

Appendix D

12. The following law and motion matters are to be had:

(a) Defendant FDIC will move this Court for an order that it is not liable to pay pre-judgment interest on plaintiffs' damages and that FDIC may satisfy the judgment to be entered herein by issuing Receiver's Certificates to plaintiffs.

(b) Plaintiffs will oppose the motion and seek the award of pre-judgment interest on the judgment and the payment of their damages in cash.

(c) FDIC will file and fax serve a motion that presents these two legal issues on or before September 2, 1997. Plaintiffs will file and fax serve their opposition to that motion on or before September 16, 1997. FDIC may file and fax serve a reply to plaintiffs' opposition on or before September 22, 1997. The motion will be heard on September 29, 1997, at 10:00 A.M., or as soon thereafter as the matter may be heard, in Courtroom 2 of the above-entitled court.

(d) If necessary, the parties will present the DONALD J. BRUYN claim for $8,902.40 in vacation pay to the Court for its decision, including the FDIC's argument that this matter is not properly before the Court, prior to entry of judgment herein.

13. Bifurcation is not necessary.

14. The foregoing admissions of fact and law having been made by the parties, and the parties having stipulated

that there are no issues of fact and law to be litigated other than as stated herein, this pretrial conference order shall supersede the pleadings and govern the course of all further proceedings in this cause unless modified to prevent manifest injustice, and plaintiffs are entitled to entry of judgment as provided and stipulated herein.

Dated: Sept 17, 1997

s/ GARY L. TAYLOR
GARY L. TAYLOR
UNITED STATES DISTRICT
JUDGE

Approved as to form and content
and stipulated between the parties.

TOLEDANO & WALD

By: s/ James Toledano
JAMES TOLEDANO
Attorneys for plaintiffs

COLLINS & BELLENGHI

By: s/ Julian Bellenghi
JULIAN BELLENGHI
Attorneys for defendant FDIC

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 27, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56747

DC No. CV 95-0017 GLT

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Appendix E

GEORGE KLASSER; EVODIO MEDINA; VIOLETTE NAAMAN; KIMBERLY JO OLIVA; HASMIK PASHAIE; SUSAN J. ROSSI; MARIA DEL CARMEN CONTRERAS; JOHN U. CRANDALL, III; JAN M. EISENBEISZ; KYLE LANCE MILLER,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Defendant-Appellee.

ORDER

Before: BOOCHEVER, O'SCANNLAIN, and TASHIMA, Circuit Judges

The panel has voted to deny appellants' petition for panel rehearing. Judges O'Scannlain and Tashima vote to deny the petition for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX F — RELEVANT STATUTE

12 U.S.C. § 1821

* * *

(d) Powers and duties of Corporation as conservator or receiver.

* * *

(3) Authority of receiver to determine claims.
(A) In general. The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B) Notice requirements. The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall —

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required. The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books —

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

* * *

(5) Procedures for determination of claims. (A) Determination period. (i) In general. Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time. The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient. The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears —

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance. If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain —

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims. The receiver shall allow any claim received on or before the date

specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period. (i) In general. Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions. Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if —

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims. (i) In general. The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors. In the case of a claim of a creditor

against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution —

> (I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and
>
> (II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions. No provision of this paragraph shall apply with respect to —

> (I) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or
>
> (II) any security interest in the assets of the institution securing any such extension of credit.

(E) No judicial review of determination pursuant to subparagraph (D). No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

* * *

(11) Depositor preference. (A) In general. Subject to section 5(e)(2)(C) [12 USCS § 1815(e)(2)(C)], of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or

any shareholder or creditor of such company).

* * *

(i) Valuation of claims in default. (1) In general. Notwithstanding any other provision of Federal law or the law of any State and regardless of the method which the Corporation determines to utilize with respect to an insured depository institution in default or in danger of default, including transactions authorized under subsection (n) of this section and section 13(c) [12 USCS § 1823(c)], of this title, this subsection shall govern the rights of the creditors (other than insured depositors) of such institution.

(2) Maximum liability. The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution without exercising the Corporation's authority under subsection (n) of this section or section 13.

* * * *

Supreme Court, U.S.
FILED
JUN 29 2000
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(2)

No. 99-1726

In the Supreme Court of the United States

SANDRA KAY BATTISTA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, APPOINTED RECEIVER OF BANK OF NEWPORT, A FAILED DEPOSITORY INSTITUTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18pp

QUESTION PRESENTED

Whether 12 U.S.C. 1821(d) and (e) require the FDIC as receiver to pay claims for damages arising from repudiated employment contracts with cash rather than receiver's certificates redeemable for a pro rata share of the assets of the failed bank.

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In the Supreme Court of the United States

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SANDRA KAY BATTISTA, ET AL., PETITIONERS

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FEDERAL DEPOSIT INSURANCE CORPORATION, APPOINTED RECEIVER OF BANK OF NEWPORT, A FAILED DEPOSITORY INSTITUTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 195 F.3d 1113. The opinion of the district court (Pet. App. 22a-26a) and the order of the district court denying reconsideration (Pet. App. 19a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1999. A petition for rehearing was denied on January 27, 2000 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on April 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) serves as receiver of failed insured depository institutions. 12 U.S.C. 1821(c). As receiver, the FDIC is authorized to determine and to pay claims against the financial institution in accordance with specified procedures. See 12 U.S.C. 1821(d)(3)-(13). Section 1821(d)(11) requires the FDIC as receiver to pay claims (other than secured claims to the extent of such security) with "amounts realized from the liquidation or other resolution of any insured depository institution" in a specified order of priority. 12 U.S.C. 1821(d)(11). "Administrative expenses of the receiver" are paid first, deposit liabilities next, and general creditors and other claimants last. 12 U.S.C. 1821(d)(11)(A). To the extent that the priority scheme set out in Section 1821(d)(11)(A) is inconsistent with state law, Section 1821(d)(11)(A) prevails. See 12 U.S.C. 1821(d)(11)(B)(i).

Section 1821(e) authorizes the FDIC as receiver to repudiate contracts entered into by a failed bank, including employment contracts, which the receiver determines to be burdensome and detrimental to the orderly liquidation of the bank. 12 U.S.C. 1821(e)(1). Subject to some limited exceptions not relevant here, "the liability of the * * * receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1)" is "(i) limited to actual direct compensatory damages; and (ii) determined as of * * * the date of the appointment of the * * * receiver." 12 U.S.C. 1821(e)(3)(A). Claims for "services performed before the appointment of the * * * receiver" must be "paid in accordance with [Section 1821(d) and 12 U.S.C. 1821(i)]." 12 U.S.C. 1821(e)(7)(A) and (A)(i).

Section 1821(i) specifies how claims against the receiver shall be valued. As relevant here, it provides that "[t]he maximum liability of the [FDIC] acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the [FDIC] had liquidated the assets and liabilities of such institution." 12 U.S.C. 1821(i)(2).

2. The Bank of Newport (Bank) provided severance and separation benefits to employees who were terminated without just cause (the Severance Policy). Pet. App. 2a-3a. In 1994, the Superintendent of Banks for the State of California determined that the Bank was insolvent and appointed the FDIC as its receiver. *Id.* at 3a. The FDIC as receiver (respondent) repudiated the Severance Policy pursuant to 12 U.S.C. 1821(e). Pet. App. 31a. Petitioners, former employees of the Bank, filed claims for repudiation damages with respondent in accordance with the procedures set out in 12 U.S.C. 1821(d)(3) and (5). See Pet. App. 31a. Respondent denied the claims, and petitioners sued for repudiation damages. *Id.* at 27a.

In September 1997, the parties executed and filed a stipulation, which provided that petitioners had valid repudiation claims that entitled them to a judgment in the aggregate sum of $731,354.80. Pet. App. 31a-36a. Respondent then moved for an order specifying that the judgment be paid by receiver's certificates, which entitle the holders to a pro rata share of the receivership's assets in accordance with the order of priority prescribed in Section 1821(d)(11). *Id.* at 38a. Petitioners, contending that repudiation claims must be

paid in cash from the funds of the FDIC, opposed that motion. *Id.* at 23a.[1]

On September 29, 1997, the district court issued an opinion finding that petitioners are not entitled to cash payments. Pet. App. 22a-26a. On November 3, 1997, the district court denied petitioners' motion for reconsideration, *id.* at 19a-21a, and petitioners appealed.

The Ninth Circuit affirmed. Pet. App. 1a-18a. Citing *Resolution Trust Corp.* v. *Titan Financial Corp.*, 36 F.3d 891, 892 (9th Cir. 1994), the court explained that the FDIC as receiver may pay creditors with receiver's certificates instead of cash. Pet. App. 6a. The court rejected petitioners' argument that an employee claimant entitled to "damages" under Section 1821(e) is, unlike other claimants, entitled to be paid in cash and from funds other than those raised from the liquidation of the failed bank's assets. *Id.* at 7a. The court found that the text of Section 1821, the FDIC's regulations, and relevant case law support respondent's contrary position that it may satisfy those claims, like other claims against the receiver, with receiver's certificates. *Id.* at 7a-15a.

The court also rejected petitioners' arguments that California law requires severance payments to be paid in cash. Pet. App. 15a-16a. The court noted that it is not entirely clear that California law treats severance payments as subject to the cash-payment requirement that applies to wages. *Id.* at 15a n.8. In any event, the

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[1] The parties also joined issue on whether petitioners are entitled to prejudgment interest on their repudiation claims. The district court ruled that petitioners are not so entitled, Pet. App. 26a, the court of appeals affirmed that ruling, *id.* at 16a-18a, and petitioners have not sought this Court's review of that aspect of the court of appeals' decision.

court held, such a requirement would be inconsistent with the priority provisions of Section 1821(d)(11) and would therefore be preempted in accordance with Section 1821(d)(11)(B)(i). *Id.* at 15a-16a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court. Indeed, petitioners acknowledge that the question presented by their petition is one "of first impression." Pet. 3. This Court's review is therefore not warranted.

1. The court of appeals correctly held that the FDIC as receiver may pay claims arising from its repudiation of contracts with receivership certificates, just as it may pay other claims against the receivership with those certificates. As the court explained, that conclusion flows from the text of 18 U.S.C. 1821 (1994 & Supp. 1998), the FDIC's regulations interpreting that provision, and case law interpreting the statutory scheme. See Pet. App. 7a.

a. In 1989, in response to the financial crisis posed by multiple bank and thrift failures, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which contains a comprehensive scheme for presenting and determining claims against failed federally-insured financial institutions. See *Henderson* v. *Bank of New England*, 986 F.2d 319, 320 (9th Cir.), cert. denied, 510 U.S. 995 (1993). Most FIRREA provisions affecting failed banks are contained in the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1811 *et seq.*

As the court of appeals recognized (Pet. App. 6a, 10a), FIRREA limits the claims of unsecured general creditors of each failed institution to a pro rata share of the proceeds from the liquidation of the insolvent

financial institution, unless the FDIC chooses to make additional payments from the bank insurance fund. See 12 U.S.C. 1821(i)(2). Congress provided no other source of funds for the payment of claims arising from the receiver's actions, including its repudiation of the failed bank's contracts.

Moreover, in 1993, Congress amended FIRREA to provide that claims be paid in an order that would both ensure the orderly administration of the receivership estate and maximize protection of depositors of failed institutions. See Pub. L. No. 103-66, § 3001, 107 Stat. 336 (12 U.S.C. 1821(d)(11)). Under that amendment, administrative expenses of the receivership are paid first, deposit liabilities are paid next, and other claims are paid only after those two categories are satisfied. 12 U.S.C. 1821(d)(11)(A). At the same time, Congress reaffirmed that claimants are limited to a pro rata share of the remaining assets of the failed institution by specifying that claims are to be paid from "amounts realized from the liquidation or other resolution" of the institution. See *ibid.*

To implement those provisions, the FDIC as receiver is vested with broad discretion to "pay creditor claims * * * *in such manner and amounts* as are authorized under [the FDI Act]." 12 U.S.C. 1821(d)(10)(A) (emphasis added). As the court of appeals explained, the FDIC uses receiver's certificates as its manner of payment in order to ensure that claimants receive only a pro rata share of the proceeds from the liquidation of a failed financial institution's assets, as specified by Section 1821(i)(2), in the order of priority specified by Section 1821(d)(11). See Pet. App. 6a-7a. "To require the FDIC to pay certain creditors in cash would allow those creditors to 'jump the line,' recovering more than their pro rata share of the liquidated assets, if [as is

often the case] the financial institution's debts exceed its assets." *Id.* at 7a. See *Resolution Trust Corp.* v. *Titan Fin. Corp.*, 36 F.3d 891, 892 (9th Cir. 1994).

The authority of a receiver to structure payments so that claimants receive only their pro rata distribution of the assets of the failed institution is supported by cases decided both before and after FIRREA. See *McAllister* v. *Resolution Trust Corp.*, 201 F.3d 570, 581 (5th Cir. 2000) (receiver's certificates); *Titan Fin. Corp.*, 36 F.3d at 892 (same); see also *United States ex rel. White* v. *Knox*, 111 U.S. 784, 786 (1884); *Adams* v. *Zimmerman*, 73 F.3d 1164, 1171-1172 (1st Cir. 1996); *Woodbridge Plaza* v. *Bank of Irvine*, 815 F.2d 538, 541-542 (9th Cir. 1987); *First Empire Bank* v. *FDIC*, 572 F.2d 1361, 1371 (9th Cir.), cert. denied, 439 U.S. 919 (1978).[2]

b. Petitioners do not take issue with the FDIC's authority generally to pay claims against the receivership with receivership certificates, but they argue (Pet. 7-22) that this method of payment may not be used to satisfy claims for damages arising from the repudiation of contracts under Section 1821(e). As the court of appeals explained (Pet. App. 7a-15a), that argument is not tenable.

Under Section 1821, the receiver's repudiation of a preexisting contract of the failed institution gives rise

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[2] Authority for the use of receiver's certificates is further provided by 12 U.S.C. 1821(d)(10)(B), which states that "[t]he receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time." That provision depends on the premise that the FDIC as receiver may pay an approved creditor or claimant of a failed bank by delivering a certificate that entitles the holder to its share of the failed bank's assets. The receiver may then pay dividends on the certificates as funds from liquidated assets become available.

to an ordinary contract claim against the receiver, albeit one for limited damages. See *Howell* v. *FDIC*, 986 F.2d 569, 571 (1st Cir. 1993). Section 1821(e)(3) limits the damages for which the receiver is liable under a repudiation claim to "actual direct compensatory damages." 12 U.S.C. 1821(e)(3)(A)(i). Congress employed the phrase "actual direct compensatory damages" in order to restrict the amount recoverable by a repudiation claimant. See 12 U.S.C. 1821(e)(3)(B) ("actual direct compensatory damages" do not include punitive or exemplary damages, damages for lost profits or opportunity, or damages for pain and suffering); *Lawson* v. *FDIC*, 3 F.3d 11, 15 (1st Cir. 1993). Congress did not establish a separate payment scheme for repudiation claims.[3]

Nor does any other provision of Section 1821(e) exempt a contract-repudiation claim from Section 1821(d)'s general procedures for the determination and payment of claims or Section 1821(i)(2)'s requirement that a claimant's recovery not exceed his pro rata share of the liquidated institution's assets. To the contrary, Section 1821(e) expressly provides that repudiation

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[3] There is no merit to petitioners' contention (Pet. 7-14) that Congress used the phrase "actual direct compensatory damages" to indicate that repudiation claimants must be paid in cash and made whole even when the institution's assets are insufficient to satisfy other claimants. Indeed, petitioners' argument stands Section 1821(e)(3) on its head: as the text above explains, that Section was designed to limit recovery by contract-repudiation claimants, not to give them preference over other claimants. It is thus not surprising that no court has ever held that Section 1821(e)(3) has the effect that petitioners attribute to it. Moreover, as petitioners themselves acknowledge (Pet. 10), no court has adopted the more general premise on which their argument depends—that damages must invariably be paid in cash.

claims of the type asserted by petitioners are subject to those provisions. 12 U.S.C. 1821(e)(7)(A) and (A)(i) ("In the case of any contract for services between any person and any insured depository institution for which the [FDIC] has been appointed conservator or receiver, any claim of such person for services performed before the appointment of the conservator or the receiver shall be * * * a claim to be paid in accordance with [Section 1821(d) and (i)].").

As the court of appeals reasoned, "if Congress had wished to depart from the § 1821(d) regime for claims for damages under § 1821(e), presumably it would have said so. In fact, it did just that in § 1821(f) with respect to the payment of insured deposits." Pet. App. 9a. That Section requires payment of insured depositors "as soon as possible * * * either by cash [from the Bank Insurance Fund] or by making available to each depositor a transferred deposit in a new insured depository institution." 12 U.S.C. 1821(f)(1). See also 12 U.S.C. 1821(i)(3)(A) (the FDIC may "in its discretion and in the interests of minimizing its losses" use its own funds to pay a claimant).

Moreover, in Section 1821(f), Congress expressly authorized the FDIC to create a separate procedure for determining claims arising under that Section. See 12 U.S.C. 1821(f)(2)-(5). Congress did not, however, authorize an independent claims process for claims under Section 1821(e). The failure to do so indicates a congressional intent that repudiation claims be subject to the general process set out in Section 1821(d).[4]

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[4] Section 1821(f) thus refutes petitioners' contention (Pet. 15-18) that the failure to provide a determination and claims process (with such features as notice and time limits for filing and deciding claims) supports their assertion of a right to immediate cash

Furthermore, as the court of appeals explained (Pet. App. 10a-12a), to accept petitioners' contention that contract-repudiation claims must be paid immediately and in cash would undermine the distribution priority set forth in Section 1821(d)(11). That provision gives no indication that Congress intended such a result. Indeed, it suggests the opposite. Depositor claims under Section 1821(f) are singled out and given priority by the text of Section 1821(d)(11)(A) over general unsecured claims, but contract-repudiation claims under Section 1821(e) are not. Moreover, Section 1821(d)(11)(A) refutes any suggestion (see Pet. 19) that contract-repudiation claims can be distinguished from other claims because they are triggered by the action of the receiver. "Administrative expenses of the receiver," which also result from the receiver's exercise of its discretion, are expressly included within the ambit of Section 1821(d). See 12 U.S.C. 1821(d)(11)(A)(i).[5]

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payment. Petitioners' related contention that the process set out in Section 1821(d) is "simply inapplicable and inappropriate to its use for 'damages' claims" (Pet. 15) is contradicted by their acknowledgment (Pet. 17) that the FDIC, with court approval, has been using that process for those claims. Indeed, petitioners availed themselves of several provisions of Section 1821(d) to present their claims in this very case to the FDIC. See p. 3, *supra*; Pet. App. 31a (with only three exceptions, "each plaintiff duly executed and timely filed with FDIC its executed claim form demanding payment").

[5] Claims for severance pay are not administrative claims because severance pay is compensation for employment services performed before the receivership. See *In re Pacific Far East Line, Inc.*, 713 F.2d 476, 478 (9th Cir. 1983). The FDIC has promulgated a regulation interpreting Section 1821(d)(11) and specifying what constitutes an administrative expense. See 12 C.F.R. 360.4 (administrative expenses include those that "the receiver determines are necessary and appropriate to facilitate the smooth and orderly

Finally, petitioners' contention (Pet. 18-22) that repudiation damages are payable "by the FDIC from its own resources" (Pet. 22) is inconsistent with 12 U.S.C. 1821(i)(2), which provides that the maximum liability of the FDIC, acting "as receiver or in any other capacity, to any person having a claim against the receiver" is equal to the amount such claimant would have received if the receiver had liquidated the failed institution. See also 12 U.S.C. 1821(e)(3)(A) (discussing "liability of the conservator or *receiver* for the disaffirmance or repudiation of any contract") (emphasis added). Although the FDIC in its corporate capacity is the federal insurer of deposits, it is a separate jural entity and is not liable for the actions of the receiver, a federal liquidator. See *Bullion Servs., Inc.* v. *Valley State Bank*, 50 F.3d 705, 708-709 (9th Cir. 1995) (the FDIC in its corporate capacity is a legally distinct entity and is not liable for the actions of the FDIC as receiver). Indeed, the FDIC in its corporate capacity is not even a party to this litigation.

2. Petitioners argue (Pet. 22-24) that the court of appeals erred in failing to give effect to California law,

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liquidation or other resolution of the institution"). In the course of the rulemaking, the FDIC determined that administrative expenses "[g]enerally * * * do not include * * * severance pay claims, golden parachute claims and claims arising from contract repudiations." 60 Fed. Reg. 35,487 (1995). Thus, as the court of appeals explained (Pet. App. 12a-13a), the FDIC, in direct conflict with petitioners' contentions here, has interpreted the statute and its regulations to provide that contract-repudiation claims are subject to the provisions of Section 1821(d) but are not entitled to the same priority as administrative claims. That interpretation is entitled to deference. See *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1663 (2000); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

which petitioners contend requires that severance payments be made in cash. They further argue (Pet. 22, 24) that the court of appeals' decision conflicts with this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994), which held that state law governs the FDIC's resolution of claims "except where some provision in the extensive framework of FIRREA provides otherwise." Neither argument has merit.

As the court of appeals noted, it is not clear that the California Code provisions cited by petitioners, Cal. Lab. Code § 200(a) (West 1989); *id.* § 212(a) (West 1989 & Supp. 2000), require the payment of severance benefits in cash. See Pet. App. 15a n.8. More important, the distribution and payment scheme in Section 1821(d) expressly preempts state law "to the extent such law is inconsistent" with its provisions. See 12 U.S.C. 1821(d)(11)(B)(i). A state law requiring the receiver to pay severance benefits in cash would be inconsistent with Section 1821(d)'s distribution scheme, which treats claimants like petitioners the same as other unsecured general creditors and subordinates their claims to administrative and depositor claims. As the court of appeals explained, California law as understood by petitioners would entitle them to "payment in full, while other claimants would be limited to their share of whatever bank assets were left over." Pet. App. 16a.

Thus, the court of appeals correctly decided that Section 1821(d)(11) preempts the California law on which petitioners rely. See *Monrad v. FDIC*, 62 F.3d 1169, 1173 (9th Cir. 1995) (receiver's liability for severance payments is to be determined under federal law). Moreover, the court's decision is fully consistent with *O'Melveny & Myers*, because Section 1821(d)(11)(B)(i) expressly provides that Section 1821(d)(11) takes precedence over inconsistent state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1726

IN THE
Supreme Court of the United States

SANDRA KAY BATTISTA, *et al.*,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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The FDIC argues in its opposition to the petition that subsections (d) and (e) of 12 U.S.C. § 1821 must be read as if they were one, and that Congress wanted all pre-seizure claims against a failed bank and all post-seizure claims against the FDIC to be treated alike. Consequently, the FDIC argues, both kinds of claimant must be paid from the liquidated assets of the failed bank and petitioners do not have the right to be paid in cash, despite California law requiring the payment of wages in cash. The FDIC's argument does not stand scrutiny.

If the FDIC and the Ninth Circuit are correct that Congress intended that all parties with claims arising out of a bank's failure be satisfied pursuant to § 1821(d), then why did Congress, as the FDIC admits, fail to include parties with claims under § 1821(e) in the list of those who are to share in the liquidated assets that are all that is available to subsection (d) claimants? The consequence of this reasoning is that if "damages" claimants like petitioners cannot have cash from the FDIC then Congress must have intended that they get nothing at all.

Fortunately, this argument is contradicted by the words of the statute and by Congress' obvious purpose in enacting two separate subsections using entirely different words, as well as the public policy behind subsection (e) *and* the understanding of every court that has looked at any part of this issue.

The FDIC's position and the decision below thus set up a genuine conflict with numerous Courts of Appeals cases and with decisions of this Court that requires the grant of certiorari to correct.

FURTHER REASONS FOR GRANTING THE WRIT

A. The Sweeping Implications of the Ninth Circuit's Merger of Subsection (e) Into Subsection (d) Require This Court's Intervention.

The FDIC's casual dismissal of the necessity for certiorari in this case is wrong on two counts. While no other decision holds *directly* contrary to the Ninth Circuit's decision below, that decision is entirely inconsistent with the understanding

shown in numerous other Court of Appeals cases. There is certainly no bright line rule that unless two circuits hold directly contrary certiorari is not necessary or appropriate.

Even more important, however, is the long-range implication of the Ninth Circuit's decision here. 12 U.S.C. § 1821(e) grants a right to damages to more than merely persons with repudiated severance and separation agreements such as petitioners. Subsections (4), (5) and (6) of § 1821(e) separately provide for the payment of damages after repudiation in other cases and the Ninth Circuit's incorrect holding is equally applicable to those claimants as well.

Subsections (e)(4) and (e)(5) apply to leases where the failed bank was a lessee or lessor. In each case, the FDIC is made liable for "damages" if at any time it disaffirms or repudiates a lease. Similarly, subsection (e)(6) allows the FDIC to repudiate real property sales contracts. There too, Congress provided "damages" for the injured buyer.

In those cases, however, unlike the requirement in subsection (e)(3) that the FDIC must act within a "reasonable" time, the FDIC may repudiate at any time, even long after all of the former bank's assets have been liquidated and distributed. Under the Ninth Circuit's holding below, if the former bank has been liquidated and the proceeds distributed within the statutory timetable Congress mandated in subsection (d), all that the lessor, lessee or buyer would receive is a receiver's certificate, solely payable from a fund that no longer exists, that is therefore actually worthless when tendered.

Parties to long-term vested financial obligations of the failed bank were given a special status by Congress in subsection (e). The effect of the Ninth Circuit's holding is that, unlike ordinary trade creditors who at least have an opportunity within a short and defined period of time to prove their claims and to get in line for whatever is left of the assets of the failed bank, these "damages" claimants would be pretty much guaranteed to get nothing at all, turning Congress' intent upside down. This

interpretation is a sweeping revision of the law with far-reaching implications.

Aside from the clearly deleterious impact this would have on all present parties with contracts with banks already seized, the likelihood of such a disastrous consequence could have a serious future impact on the willingness of any third party to enter into a contract with any financial institution, because under the Ninth Circuit's holding if the bank should fail this valuable asset would be replaced with a piece of paper with no value at all.

It does not require a direct conflict with the decisions of other Circuits to make the long- and short-term consequences of the Ninth Circuit's interpretation of § 1821(e) a fit subject for certiorari. However, it is also true that this decision is inconsistent with all inferences generally drawn by other Courts of Appeals and this Court.

Repudiation has invariably been treated by other courts as a breach of contract that gives rise to an ordinary contract claim for compensatory damages. *See, e.g., Howell v. FDIC*, 986 F.2d 569, 579 (1st Cir. 1993), and *see Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, __ U.S. __ (No. 99-244), slip opinion at 5-6 (June 26, 2000). The purpose of such damages has always been understood to be to put the injured party in as good a position as that party would have been put by full performance of the contract. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 2117 (9th Cir. 1983). In other words, damages are supposed to make one whole by precisely compensating the repudiated contract party for what should have been paid. *McMillian v. FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996).

It has also always been understood, although no case is directly on point, that Congress drew a distinction between "damages" claims under subsection (e) and "creditor" claims under subsection (d), and that Congress intended that § 1821(e) contract repudiation "damages" be a liability of the FDIC, rather

than a claim against the former bank's assets. *See, e.g., Homeland Stores, Inc. v. RTC*, 17 F.3d 1269 (10th Cir. 1994).

On the other hand, no court has ever held that a right to "damages" could be satisfied with anything but cash nor that parties to whom Congress granted a right after seizure to "actual direct compensatory damages" or any other form of post-seizure "damages" from the FDIC instead became creditors of the former bank who must be paid from the liquidated assets of that bank. And, not only has no court ever held that Congress' award of damages to a party was inconsistent with a state's desire that such damages be paid in cash, that conclusion flies in the face of this Court's holding that without an identifiable federal policy or interest it is improper to allow the FDIC to displace a state's law with some presumed "federal common-law" defense to its liability. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994).

There is no reason why Congress would order the FDIC to pay repudiation damages with the unstated intent that the damaged parties could never be made whole, The FDIC's argument has no more substance than what it made in *O'Melveny*. And if the decision below continues as precedent it will have a significant and long-lasting negative impact on banks and those who make contracts with banks, for no discernable congressional purpose.

B. The FDIC's Opposition Ignores Congress' Careful Choice of Language in § 1821(d), § 1821(e) and § 1821(i).

The fundamental flaw in the FDIC's argument is its disregard for Congress' choice of language. It uses terms broadly that Congress used narrowly, omits and adds qualifiers that are not in the statute and disregards the context of the law. What the FDIC does not do is confront the express language of the statute and the impossibility of merging damages claims under subsection (e) into the payment process for ordinary trade creditors set out at length in subsection (d).

Throughout its brief, the FDIC persists in referring to "creditors" and "creditor claims" as if Congress had applied those terms to repudiation damages claimants. Br. Resp. 5-7. It did not. Not once did Congress call a "damages" claimant a "creditor" nor did Congress include the payment of "damages" in the process leading to payment of creditors' claims. To the contrary, the plain language of the statute undermines the FDIC's argument.

For one example, among many others, the claims process that ends in distribution of the former bank's assets begins with a requirement that the FDIC promptly mail notice to creditors shown on the institution's books to file a claim within 90 days or lose the right to be paid. 12 U.S.C. §§ 1821(d)(3)(B) and (C). But damages claimants are not only not creditors, are not shown as such on the failed bank's books and receive no notice, they do not become claimants until some future date if the FDIC chooses to repudiate their contracts, and at that time they become claimants against the FDIC, not the bank.

The FDIC is similarly undone by its reliance on the distribution priority that Congress created in 1993 to establish by statute the order in which the creditors were entitled to a pro rata share of the liquidated assets. § 1821(d)(11)(A). The problem for the FDIC here is that "damages" claimants are not included in the five categories to which Congress restricted the distribution of those liquidated assets of the failed bank: "damages" are not administrative expenses, they are not deposit liabilities, they are not general or senior liabilities of the bank, they are not obligations subordinate to depositors or creditors and they are not obligations to shareholders. *See* § 1821(d)(11)(A)(i)-(v).

It can therefore hardly "upset" the distribution priority among the contenders for the former bank's liquidated assets if the FDIC must pay "damages" claims such as petitioners directly, rather than from those assets. It therefore cannot be said, as the Ninth Circuit did below, that paying petitioners in

cash would allow them to "jump the line", since Congress expressly left them out of that line. Pet. App. 7a. The distribution priority set out in § 1821(d)(11)(A) thus precludes the payment of damages from the liquidated assets of the failed bank and requires their payment by the FDIC as money damages as Congress provided in subsection (e).

The FDIC's reliance on Congress' limitation on the aggregate amount of payments to allowed creditors to the total value of the former bank's liquidated assets in § 1821(i) is similarly misguided. Subsection (i)(2) indeed requires that a claimant's recovery not exceed its pro rata share of the liquidated institution's assets, but subsection (i) by its own language "govern[s] the rights of the *creditors* (other than insured depositors) *of such institution*." Pet. App. 48a (emphasis added). But it is the claims of creditors of the bank alone who are subject to the subsection (i) ceiling, *First Indiana Federal Savings Bank v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992), petitioners are not creditors of the former bank but have direct claims against the FDIC instead, and thus subsection (i) has no application to petitioners' claims at all.

Indeed, were § 1821(i) to mean what the FDIC and the Ninth Circuit said it meant, as a practical matter *no* entity with *any* claim against the FDIC for *any* act of the FDIC could *ever* be made whole. If the most that the FDIC would ever have to pay to any claimant under any circumstances is an amount equal to the claimant's pro rata share of what was realized by liquidating the few remaining assets of the failed bank, then that same limitation would have to be imposed on, for example, the damages that this Court required FSLIC to pay for its breach of contract in *United States v. Winstar Corp.*, 518 U.S. 839, 871, 909-910 (1996), the "full cash amount" of compensatory damages that the Ninth Circuit said that the FDIC was required to pay to the plaintiffs in *Sharpe v. FDIC*, 126 F.3d 1147, 1156-1157 (9th Cir. 1997), and a $26.6 million judgment against the FDIC for its repudiation of a contract, also upheld by the Ninth

Circuit, would have had to have been reduced to a pro rata share of the bank's liquidated assets, *Far West Federal Bank v. Thrift Supervision-Director*, 119 F.3d 1358, 1367 (9th Cir. 1997).

Clearly, Congress intended § 1821(i) simply to protect the FDIC from having to pay the trade creditors of the failed bank any more than what it had collected from liquidating the defunct bank's assets. Equally clearly, Congress did not intend that subsection (i) should also cap the direct liability of the FDIC for its own acts, including breaches of contract or, as here, the payment of repudiation damages.

Finally, if Congress had intended that repudiation damages suffered by persons like petitioners should be included among the claims of the former bank's pre-seizure creditors it would have said so. After all, Congress demonstrated that it was perfectly capable of expressly importing provisions of subsection (d) into subsection (e) when it chose to do so, as it did when it provided in subsections (e)(7)(A) and (e)(7)(B) that some claims be paid in accordance with subsections (d) and (i), that other claims be included in the distribution priority as administrative expenses under subsection (d)(11)(A) and when Congress specified in subsection (e)(8)(B) that subsection (d)(12) should apply in the case of judicial actions arising out of certain qualified financial contracts.

The scenario that the FDIC and the Ninth Circuit posit is irrational and destructive of Congress' purpose. If Congress intended that petitioners should be made whole it would not have forced them to look to a scheme that by its express language gives them nothing, and clearly Congress did not do so.

While the relevant language is not a masterpiece of clear writing, lack of clarity is not ambiguity and when Congress writes a statute its language should be read to give meaning to the words that Congress chooses. *Johnson v. United States*, __ U.S. __, 120 S. Ct. 1795, 1803-1805, esp. 1804, n.9 (2000); and *see* 120 S. Ct. at 1808-1812 (Scalia, J., dissenting). As Congress did not allow claims for damages owed by the FDIC to be paid from the marshaled assets, the only conclusion to be

drawn is, as petitioners argue, that Congress knew and intended that "damages" be payable in money.

C. The Statute as Written by Congress Upholds California's Interest in Cash Payment of Petitioners' Severance Pay

Finally, the FDIC's argument that California law has been preempted and that in any event it is unclear fails because it is based on the erroneous conclusion that Congress did not intend that petitioners be paid in cash.

First, neither the FDIC nor the Ninth Circuit ever explains why it is "not clear" that California law requires payment in cash.[1] Br. Resp. 12. What is crystal clear, however, is that since § 1821(d)(11) does not give petitioners a right to participate in the liquidated assets of the failed bank and § 1821(e) gives petitioners a right to be paid in cash by the FDIC, petitioners' formulation, as quoted by the FDIC, is entirely correct:

> . . . California law as understood by petitioners would entitle them to "payment in full, while other claimants would be limited to their share of whatever bank assets were left over."

Br. Resp. 12, quoting Pet. App. 16a.

Consequently, Congress' intention that petitioners should be paid in cash by the FDIC and not limited to a belated participation in the scraps of the failed bank, and California's intention that severance and separation pay benefits be paid in cash, are entirely congruent.

The test for preemption is, of course, whether enforcement of the state law impedes the accomplishment and execution of Congress' full purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). A conclusion that Congress intended to

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1. If the consistently stated position of the California cases and the language of the California statutes are not sufficiently clear the Court of Appeals could have certified the question to the California Supreme Court.

occupy that field would be directly at odds with Congress' choice of the word "damages", its creation of two discrete paths, for the bank's creditors against the bank's assets and "damages" claimants directly against the FDIC, and Congress' careful use of the word "creditor" only with respect to claimants under subsection (d). California's interest and that expressed by Congress are the same and the Ninth Circuit's interpretation thwarts, rather than advances, Congress' purpose in allowing the FDIC to repudiate contracts but protect the contracting parties from serious consequences. *O'Melveny & Myers v. FDIC*, *supra*, 512 U.S. at 86-89.

CONCLUSION

The FDIC's position and that of the Ninth Circuit are simply incorrect and if allowed to stand it not only deprives petitioners of over $750,000 in benefits that California law entitles them to be paid in cash, it will materially and negatively impact the way third parties do business with the nation's banks. The petition for a writ of certiorari should therefore be granted.

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